IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-5920

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SUPREME COURT, U.S.

MICHAEL V. COSTELLO, and
ROBERTO K. CELESTINEO, and
others similarly situated,

Petitioners,

-v-.

LOUIS L. WAINWRIGHT, Director
of the Division of Corrections,
State of Florida, et al.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IV

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-

MICHAEL V. COSTELLO, and
ROBERTO K. CELESTINEO, and
others similarly situated,

Petitioners,

-v-

LOUIS L. WAINWRIGHT, Director
of the Division of Corrections,
State of Florida, et al.,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on September 27, 1976.

OPINIONS BELOW

1. Two orders of the district court, which appointed the United States as amicus curiae in the case, and which appointed an expert medical survey team as special masters are reported respectively at 353 F.Supp. 1324 (Dec. 6, 1972) and 387 F.Supp. 324 (July 16, 1973); appendix infra pp. 1a-2a and 3a-7a.

2. The opihion of the United States District Court for the Middle District of Florida, dated May 22, 1975 is reported at 397 F.Supp. 20; appendix infra pp. 8a-28a.

3. The Findings and Conclusions of the District Court entered on June 27, 1975, following a limited remand from the Court of Appeals to determine the capacity of Florida to carry out the preliminary injunction is unreported. See appendix infra pp. 29a-47a.

4. The opinion of a panel of the United States Court of Appeals for the Fifth Circuit, dated January 15, 1976 is reported at 525 F.2d 1239; appendix infra pp. 48a-63a.

5. The en banc opinion of the United States Court of Appeals for the Fifth Circuit, dated September 27, 1976 is reported at 539 F.2d 547; appendix infra pp. 64a-71a.

JURISDICTION

The Judgment of the Court of Appeals was entered on September 27, 1976; appendix infra p. 72a. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Must an injunction which orders state officials to relieve overcrowding of Florida prisons to protect inmates' Eighth and Fourteenth Amendment rights be issued by a three judge court convened under 28 U.S.C. §2281, where the relief ordered arguably may force corrections officials to disregard state laws in order to comply with the Constitution, but the merits of the case do not involve the constitutionality of such state statutes and their validity was never questioned or decided.

2. Where Congress has repealed 28 U.S.C. §2281, but has provided that the repeal "shall not apply to any action

commenced on or before the date of enactment", does the principle that a court should apply the law in effect at the time it renders its decision preclude the convening of a new three judge court at the remedy stage of a long pending suit.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following federal statutes:

a. 28 U.S.C. §2281: Injunction against enforcement of State statute; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 968.

b. Public law 94-381, August 12, 1976; 90 Stat. 1119:

An Act to improve judicial machinery by amending the requirement for a three-judge court in certain cases and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2281 of title 28, United States Code, is repealed.

Sec. 2. That section 2282 of title 28, United States Code, is repealed.

Sec. 3. That section 2284 of title 28, United States Code, is amended to read as follows:

"2284. Three-judge court; when required; composition; procedure

"(a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

"(b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows:

"(1) Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.

"(2) If the action is against a State, or officer or agency thereof, at least five days' notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State. The hearing shall be given precedence and held at the earliest practicable day.

"(3) A single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except as provided in this subsection. He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. A single judge shall not appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits. Any action of a single judge may be reviewed by the full court at any time before final judgment."

Sec. 4. The analysis of chapter 155 of title 28, United States Code, is amended to read as follows:

"Sec.
"2281. Repealed.
"2282. Repealed.
"2283. Stay of State court proceedings.
"2284. Three-judge district court; when required; composition; procedure."

Sec. 5. (a) Section 2403 of title 28, United States Code is amended --

(1) by inserting the subsection "(a)" immediately before "In" and

(2) by adding at the end thereof the following new subsection:

"(b) In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party,

wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.".

(b)The catchline to section 2403 of title 28, United States Code, is amended to read as follows:

"§2403. Intervention by United States or a State; constitutional question".

Sec. 6. Item 2403 of the analysis of chapter 161, of title 28, United States Code, is amended to read as follows:

"2403. Intervention by United States or a State; constitutional question".

Sec. 7. This Act shall not apply to any action commenced on or before the date of enactment.

Approved August 12, 1976.

3. The case involves the following Florida statutes:

a. Section 839.21 Refusal to receive prisoner

Any jailer or other officer, who willfully refuses to receive into the jail or into his custody a prisoner lawfully directed to be committed thereto on a criminal charge or conviction, or any lawful process whatever, shall be guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083. (Laws 1971, c. 71-136, §1031)

b. Section 944.16: Prisoners: how received

All prisoners shall be delivered to the custody of the division at such reception and classification centers as shall be provided for this purpose. No prisoner shall be received by the division, unless the sheriff, United States marshal, or other officer having such prisoner in charge, shall also deliver a commitment in due form issued by authority of the court committing such prisoners. (Laws 1969, c. 69-106, §§ 19,35.)

c. Section 944.29: Extra good time allowances

The division may allow, in addition to time credits, an extra good time allowance for meritorious conduct or exceptional industry. (Laws 1969, c. 69-106, §§ 19, 35.)

d. Section 944.291: Prisoner released by reason of gain time allowances

(1)(a) A prisoner who has served his term or terms, less allowable statutory gain time deductions and extra good time allowances as provided by law, shall, upon release, be deemed as if released on parole until the expiration of the maximum term or terms for which he was actually sentenced or such lesser time as may be determined by the Florida parole and probation commission pursuant to §947.13.

(b) The provisions of this section shall not apply to prisoners who have not earned at least one hundred eighty days' gain time.

(2) A prisoner so released shall be under the supervision and control of the parole and probation commission in accordance with the appropriate provisions of Chapter 947, pertaining to paroles and parolees and their supervision, disposition, and control. (Laws 1967, c. 67-421, § 1.)

e. Section 945.09: Commitment of prisoners; classification; Reception and Classification Center; transfer

All prisoners sentenced to the state penitentiary shall be committed by the court to the custody of the division and shall be conveyed in the manner provided by law to such institution in the correctional system as the division shall direct. The division shall establish a Reception and Classification Center for male prisoners at Lake Butler. The division shall provide reception and classification facilities for female prisoners at the Florida Correctional Institution at Lowell. Classification facilities shall be provided in the discretion of the division at all institutions in the correctional system. Pursuant to such regulations as the division may provide, the division is authorized to transfer prisoners from one institution to another institution in the correctional system and to reclassify prisoners as circumstances may require. (Laws 1969, c. 69-106, §§ 19, 35.)

f. Section 945.091: Extend the limits of confinement

(1) The division is authorized to adopt regulations permitting the extension of the limits of the place of confinement of an inmate as to whom there is reasonable cause to believe he will honor his trust by authorizing him, under prescribed conditions and following investigation and approval by the director, who shall maintain a written record of such action and forward a copy of his approval to the parole and probation commission, to leave the confines of that place unaccompanied by a custodial agent for a prescribed period of time to:

(a) Visit, for a specified period, a specifically designated place or places for the purpose of visiting a dying relative, attending the funeral of a relative, or arranging for employment or for a suitable residence for use when released, to otherwise aid in the rehabilitation of the inmate, or for another compelling reason consistent with the public interest, and return to the same or another institution or facility designated by the division of corrections; or

(b) Work at paid employment, participate in education or a training program, or voluntarily serve a public or nonprofit agency in the community while continuing as an inmate of the institution or facility in which he shall be confined except during the hours of his employment, education, training or service and traveling thereto and therefrom. Inmates shall participate in paid employment only during the last twelve months of their confinement unless sooner requested by the parole and probation commission.

(2) The division may adopt regulations as to the eligibility of inmates for this extension of confinement, the disbursement of any earnings of these inmates, or the entering into of agreements between the division and any city or county or federal agency for the housing of these inmates in a local place of confinement.

(3) The willful failure of an inmate to remain within the extended limits of his confinement or to return within the time prescribed to the place of confinement designated by the division shall be deemed as an escape from the custody of the division and shall be punishable as prescribed by law.

(4) The parole and probation commission is authorized to make investigations and recommendations pertaining to the validity of requests for visits by inmates, community attitudes towards

inmates, and job opportunities for inmates and to otherwise assist the division when requested in the implementation of the program herein authorized. (Laws 1971, c. 71-112, § 1.)

STATEMENT OF THE CASE

This is a suit by prisoners in the Florida prison system who complain that they have been subjected to cruel and unusual punishment by the deprivation of medical care. The case began with two handwritten prisoner complaints in the United States District Court for the Middle District of Florida in February 1972. The Middle District has more pending prisoner civil rights cases than any other district court in the nation; 1,049 pending cases in the Middle District out of 6,341 in the entire country as of June 30, 1976.[1] When complaints were filed by Roberto Celestineo and Michael Costello, District Judge Scott consolidated the cases, granted forma pauperis status, and appointed Tobias Simon, Esq., as plaintiffs' counsel.[2] Also the United States was appointed to represent the public interest as amicus curiae with the right to present evidence. 353 F. Supp. 1324.

The Second Amended Complaint, alleged jurisdiction in the district court under 28 U.S.C. §1343, to protect plaintiffs'

1/ 1976 Annual Report of the Director, Administrative Office of the United States Courts, p. I-21, Table C 3A. (Hereafter cited as "1976 Annual Report of the Director".)

2/ When the case was subsequently certified as a class action, Mr. Simon was also appointed to represent the class. Mr. Celestineo has been recently released on parole; Mr. Costello remains in prison.

rights under 42 U.S.C. §1983, and the Eighth and Fourteenth Amendments to the Constitution of the United States. The district court certified a class action on behalf of "all those persons who are now or hereafter will be committed to the custody of the defendant". The defendants are the Director of the Division of Corrections and the Director of the Division of Mental Health.[3] Plaintiffs were denied leave to add the members of the Florida Parole and Probation Commission on April 24, 1973.[4]

The Second Amended Complaint alleged inter alia that prisoners were denied access to medical facilities and personnel when seriously ill, and were denied the basic elements of adequate medical treatment; that the prison medical facilities were grossly understaffed, the medical plants and equipment were inadequate, and the administration of medical programs was shoddy; that overcrowding of the prisons was so severe (with 10,500 prisoners in a system designed for a maximum of 7500) as to damage the health of the prisoners and dilute the medical care system. The relief sought was an injunction requiring the defendants to redistribute or reduce the prison population to a level which does not "exacerbate the unhealthy conditions", and requiring them to provide basic medical care.

In February 1973 plaintiffs filed a motion for a preliminary injunction to curb overcrowding of the prison system, but the

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3/ For a more detailed description of the defendants, see the opinion below 539 F.2d at 548, note 1.

4/ Id.

application was denied without prejudice when the defendant Wainwright took administrative action to close the prisons to new inmates. On February 20, 1973, the District Court ordered the defendants to prepare a plan to reduce the number of inmates and/or improve facilities so as to enable them to provide a minimally adequate level of medical care. When Mr. Wainwright rescinded his order closing the prisons, plaintiffs on March 2, 1973 renewed their application for a preliminary injunction. The motion was denied on April 24, 1973. In July 1973, the District Court noting that Mr. Wainwright "has, without qualification, also advised this Court that the Division of Corrections is not providing adequate medical care and services to the prisoners under its jurisdiction" appointed a medical survey team led by Dr. Kenneth B. Babcock, along with Dr. Joseph Alderete and others as special masters.[5] 387 F.Supp. 324. The District Court stated that the "gist" of the Babcock report, which was filed December 19, 1973, "was that there existed gross systemic deficiencies in the delivery of adequate medical care to the inmates of the Division of Corrections, which deficiencies could be remedied by certain specific measures outlined in the report." 397 F.Supp. at 23. The defendants' response filed May 28, 1974 "concurred generally with the findings of the Babcock Commission Report and the remedies proposed therein." 397 F.Supp. at 23.

On January 13, 1975, the parties filed a lengthy Amended Pre-trial Stipulation. They stipulated that "plaintiffs have a right to adequate medical treatment and care"; that "'a

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5/ Their expert qualifications are described in the district court opinion. 397 F.Supp. at 23, notes 1, 2.

deprivation of basic elements of adequate medical treatment' constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments"; that "the due process clause requires that minimally adequate treatment be in fact provided"; that plaintiffs "are not receiving such medical treatment as would be required by guidelines based upon the Babcock Report for the availability of mental and physical health care and treatment"; and that the "Babcock Commission Report as modified by the Response of the Division of Corrections describes necessary improvements to the delivery of medical services within the prison system which, if implemented, would either: (A) Create guidelines for adequate medical care (Defendants' position) or (B) Be a major factor in meeting minimal constitutional standards (Plaintiffs' position)." 397 F.Supp. at 24.

The parties also stipulated to the link between severe overcrowding in the prisons and the denial of adequate health care:

"[Stipulation] VI-C. CAPACITY OF FACILITIES.

"The parties recognize that the normal capacity of the existing prison system should be limited to 9,313 persons; that even using temporary facilities and operating under conditions of extreme emergency, the capacity of the existing system should not be stretched beyond 10,535; and nevertheless, the number of persons committed to the custody of the DIVISION OF CORRECTIONS, as of September 30, 1973, was 11,521 or 986 over emergency capacity; that because of the temporary cessation of intake -- by reason of this overcrowding of inmates -- there is a backlog in the 67 jails of Florida in excess of 300; and that an additional 600 inmates are expected within the next 90 days.

"In brief, there is, in the custody of the DIVISION OF CORRECTIONS, 3,130 persons over normal capacity limitations and 1,908 persons over emergency capacity limitations.

"The parties recognize that severe overcrowding may be injurious to the physical and mental health of the plaintiffs and such overcrowding should be eliminated. (See VI-E, infra.)

The parties further stipulated that "any plan for improvement of medical care and treatment comparable to the Babcock Commission standards would be sufficient and acceptable."[5a/]

Notwithstanding the Babcock Report and its seeming acceptance by the defendants, and the stipulation that overcrowding was injurious to the inmates' health and "should be eliminated," the Court in April and May 1975 conducted a trial.[6/] The Court made extensive detailed findings on the "uncontroverted expert medical opinion"[7/] about the link between the overcrowding and the denial of adequate health care. See 397 F.Supp. at 24-31. Judge Scott's summary of his findings was that:

> ". . . the overwhelming evidence is that there is a direct and immediate correlation between severe overcrowding, as now exists in the Florida Prison System, and the deprivation of minimally adequate health care. In addition, it appears that severe overcrowding endangers the very lives of the inmates because of its being a factor in the causation of violence within the prison system. [9]
>
> "9/ The inmate population in the Florida Prison System has increased as follows since 1971:

5a/ The stipulation disclaimed an Agreement to implement the Babcock recommendations per se: "While the parties recognize the Babcock Commission standards, neither the Defendants nor the Legislature is bound to any particular course of action." The Defendants also preserved in the stipulation their objection to the jurisdiction of the Court and their right to appeal any order of the court.

6/ The trial was held April 21-23, and May 12-14, 1975, and then recessed for further proceedings at a later date. The preliminary injunction was issued May 22, 1975. On April 21, 1975, Plaintiffs again renewed their motion for an injunction to deal with overcrowding.

7/ The evidence on the harmful effects of overcrowding on prisoners' health is set out at 397 F.Supp. at 24-31. Physicians employed by the defendants testified to the problem. Indeed, Mr. Wainwright himself testified about the danger to prisoners' health from overcrowding: "Q. Do you regard the over-crowded conditions as a danger to the health of the prisoners in each of these institutions? -A. I think I would have to say yes." 397 F.Supp. at 30.

"June 30, 1971 9,530
June 30, 1972 10,112
June 30, 1973 10,346
June 30, 1974 11,335
March 31, 1975 12,748
May 2, 1975 13,046
May 12, 1975 approximately 13,700.
Emergency capacity on May 12, 1975 was 11,105 inmates (with the recent addition of 600 beds)."

Judge Scott personally viewed the Lake Butler Reception and Medical center. He saw four inmates in a seven foot by seven foot cell, with one man in a bunk and three sleeping on the floor. Judge Scott appended the photograph on the next page to his opinion, describing this as "a typical one-man cell with four inmates." 397 F.Supp. at 32. He found the overcrowded cells "most disturbing to the Court." Id. Judge Scott concluded that the overcrowding "creates violence, brutality, disease, bitterness, and resentment as to both inmates and correctional staff" and that it "tends to perpetuate antisocial behavior and foster recidivism so as to ultimately disserve the rehabilitative goals of the correctional system". 397 F.Supp. at 38. Judge Scott wrote that: "A free democratic society cannot cage inmates like animals in a zoo or stack them like chattels in a warehouse and expect them to emerge as decent, law abiding, contributing members of the community. In the end, society becomes the loser." 397 F.Supp. at 38.

The District Court stated its reluctance, for three years, to "intervene in the overcrowding crisis which has existed in the Florida Prison System", but finally the court determined to issue an injunction because "overwhelming evidence points toward blatant deprivations of the plaintiffs' constitutional rights, which the State of Florida has been unwilling to rectify." 397 F.Supp. at 34. On May 22, 1975, Judge Scott granted plaintiff's renewed application for a preliminary injunction to deal with

APPENDIX

EXHIBIT "A"

13a

overcrowding. He ordered the Division of Corrections (or its successor agency) to reduce the inmate population, or increase prison capacity, in stages so as to reach the level designated by defendants as "emergency capacity" within one year, and the level designated "normal capacity" by December 1, 1976. 397 F.Supp. at 38-39. The Court enjoined the defendants from housing more than one inmate in the one-man cells at Lake Butler, and ordered that each inmate be given a bed upon which to sleep. Id. The Court also denied defendants request for a three-judge court. Id.

The defendants demand for a three-judge district court was made on the fourth day of the trial, May 12, 1975. The plaintiffs opposed the request.[8/] The demand came over two years after the filing of the Second Amended Complaint, and four months after the Amended Pre-Trial Stipulation. Judge Scott thought the defendants' contention about a three-judge court "borders somewhat on the frivolous." 397 F.Supp. at 36. Defendants argued that the preliminary injunction to reduce overcrowding would restrain Section 839.21 of the Florida Statutes which makes it a crime for a jailer to refuse to receive a prisoner lawfully committed to his custody. The district court wrote that plaintiffs had not questioned the constitutionality of this statute, that there was no prosecution or threat of prosecution of defendant Wainwright under the statute, and that "This Court has not and will not require the defendant Wainwright to refuse to accept prisoners lawfully committed to his custody. He may use whatever means within his control, consistent with his constitutional and statutory obligations, to comply with this Court's injunction." 397 F.Supp. at 36.

8/ The United States, as amicus curiae, also opposed the states' argument that a three-judge court was required. See brief for United States as Amicus Curiae, in 5th Circuit, pp. 57-73.

The preliminary injunction was stayed pending appeal, and on January 15, 1976, a panel of the Fifth Circuit affirmed by a vote of 2-1, with Judge Roney dissenting. With respect to the merits of the case the court held that the correctness of the district court's findings was virtually conceded by the pre-trial stipulation. 525 F.2d at 1246-1248. The Court held that the evidence fully justified the preliminary injunction. Id. The majority also rejected the defendants arguments on the three-judge issue and an argument that the district court should have abstained from deciding the case. The Court also approved the remedy ordered and rejected the defendants arguments that the compliance was impossible:

> "It is clear that there is nothing in the trial court's preliminary injunction that cannot be accomplished but for the lack of funds. Optimistically some remedial steps can be taken even without substantial additional expenditures. In any event, the right of the plaintiffs to be secure in their constitutional rights cannot be made dependent upon the action of the state legislature in appropriating additional money, an area which we can all recognize from the course of human experience is a field in which relief too often comes, too little and too late.
>
> "It should be borne in mind that what we are dealing with here is a preliminary injunction, subject to modification at any time by the trial court upon a proper showing by the defendants that such emergency or exceptional circumstances have arisen as to warrant the Court's giving further consideration to the terms of the injunction. Moreover, it should be borne in mind that well before the final date covered by the court's order, the case should be ripe for final adjudication, after which the court's final injunction, if warranted, will be issued, based upon the facts as they then exist."

525 F.2d at 1252.

On rehearing en banc, the Court of Appeals ruled in an opinion by Judge Roney for an 11-3 majority that the relief granted by the district court was beyond the power of a single

district judge under 28 U.S.C § 2281. The majority held that the case "did not start out as a three-judge case", but that when the case became an overcrowding case and the relief needed "stretched beyond" the authority of the Director of the Division of Corrections and required him to violate Florida statutes the three-judge court problem "arises". 539 F.2d at 550-552. The court ruled that if the injunction "is to remain as written, it is beyond the jurisdiction of a single judge". The injunction was then vacated and the case remanded to "permit the district court to grant only such relief against these defendants as they can provide without nullification of state statutes, and to request the convention of a three-judge court if that is deemed appropriate under the circumstances." It should be noted that the en banc majority adopted the panel opinion on the merits and "affirms the district court's refusal to abstain, and the district court's findings of constitutional deprivations in the Florida prison system to the extent that they would support the granting of appropriate single judge relief." 539 F.2d at 549.

The dissenters, Judges Brown, Tuttle and Goldberg, wrote that the majority had inappropriately expanded the requirements for three-judge courts, in a case where "clear and manifest injustice" was being done to plaintiffs, and after Congress had repealed section 2281.

Following the decision of the Court of Appeals, petitioners have filed motions in the trial court seeking leave to add as defendants the Governor and Lieutenant Governor of Florida, the members of the Cabinet, and the Parole and Probation Commission. Another pending motion seeks injunctive relief from overcrowding consistent with the powers of these officials under state law, or in the alternative for temporary injunctive relief from the resident judge pending the convening of a three-judge court. No ruling on these motions has been issued to date.

REASONS FOR GRANTING THE WRIT

I.

The Case Involves Important Questions Which Affect Many Pending Cases.

We believe that the Fifth Circuit's expansive interpretation of 28 U.S.C. §2281 in this case, as well as in a contemporaneous case (e.g. Morales v. Turman, 535 F.2d 864 (5th Cir. 1976), petition for certiorari filed as No. 76-5881 December 16, 1976) presents an issue of sufficient importance to merit plenary review even though §2281 has been repealed by Congress. At first blush one might think that the Fifth Circuit Costello rule would apply to only a few cases. We think that is not the fact. The exact number of cases which will be affected by the Costello rule can never be ascertained in advance because the rule operates in long pending cases and does not come into play until the relief stage of the case, which may not be completed until a great deal of time has passed. Costello would require a three-judge court in any case in which a defendant state official can claim that the injunctive relief to be considered or granted would compel the disregard of a state statute or regulation, regardless of whether the constitutionality of the law or regulation has been decided in the case. Obviously such a rule affects injunctive decrees involving all kinds of constitutional claims. As we will describe below, such arguments have for example been made and rejected in school desegregation cases. See part II, infra. But even limiting consideration to correctional cases Costello may have a broad impact.

In the first place there are a great many pending prison conditions cases and the fact that many are pro se applications

does not necessarily distinguish them from Costello. See for example Sands v. Wainwright, 491 F.2d 417, 424 (5th Cir. 1972), cert. denied sub nom. Guajardo v. Estelle, 416 U.S. 992 (1974). Of a total of 6,341[9] state prisoner civil rights suits pending in all of the district courts on June 30, 1976, there were 771[10] cases which had been pending more than three years, and 577 of the cases are class actions.[11] We have not been able to find out how many of the cases involve requests for injunctive relief. Even if the Costello rule is confined to the Fifth Circuit its impact may be great, because more than a third of the prisoner cases in the nation were in that circuit -- 2,339 cases[12] -- and almost half of the Fifth Circuit cases (1,049 cases[13]) come from the Middle District of Florida where Costello arose.[14] The prisoner petitions pending in the district courts in the Fifth Circuit include 315 class actions.[15] During the Fiscal Year 1976, 619 state prisoner civil rights cases were appealed to the courts of appeals.[16]

In the second place, the impact of Costello is already evident in Mississippi where a nearly six year old prison conditions case has been referred to a three-judge court. In an unreported opinion in Gates v. Collier, which we quote extensively in the note below, Judge Keady asked for the convening

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9/ 1976 Annual Report of the Administrator, p. I-21; see also pp. 93-96.

10/ Id. at p. 88.

11/ Id. at p. 120.

12/ Id. at p. I-21.

13/ Ibid.

14/ On June 30, 1976 there were 474 prisoner cases pending in the Southern District of Texas, 136 in the Eastern District of Texas, 139 in the Northern District of Georgia, and 97 in the Northern District of Texas.

15/ 1976 Annual Report of the Administrator, p. 120.

16/ Id. at p. 67-68.

of a three-judge court under the Costello rule.[17] This happened even though the Mississippi prison conditions issues have been litigated and appealed on numerous prior occasions, Gates v. Collier, 349 F. Supp. 881 (N.D. Miss. 1972), affirmed 489 F.2d 298 (5th Cir. 1973); affirmed 501 F.2d 1291 (5th Cir. 1974); 371 F. Supp. 1368 (N.D. Miss. 1973), vacated 522 F.2d 81 (5th Cir. 1974); 390 F. Supp. 482 (N.D. Miss. 1975), affirmed 525 F.2d 965 (5th Cir. 1976); 407 F. Supp. 1117 (N.D. Miss. 1975); and even though the Fifth Circuit held in 1974 that no three judge court was required to consider the merits in Gates. 501 F.2d 1291, 1226-1299.

17/ Gates v. Collier, N.D. Miss. No. GC 71-6-K, Nov. 19, 1976. Judge Keady discussed the issue as follows:

> "Where a situation arises regarding the injunction against enforcing a statute or statutes of statewide effect on the ground of federal unconstitutionality, we become directly confronted with the question of whether the issue is one for resolution by a three-judge court convened pursuant to 28 U.S.C. §§ 2281 and 2284. It is immaterial that the issue of constitutionality of a state statute is put in question because of conflict with the effects of a federal court's injunctive order rather than from the statute's terms. 'A statute does not have to be directly challenged as unconstitutional on its face where the impact of a court order achieves the precise result requiring a three-judge court.' Costello v. Wainwright, 539 F.2d 547, 552 (5th Cir. 1976). On August 12, 1976, Public Law 94-381, 94th Congress, S.537 repealed § 2281 and amended § 2284 to eliminate the requirement of a three-judge court in actions seeking injunctive relief against enforcement of state statutes on ground of the unconstitutionality, with certain exceptions not applicable here. However, by § 7 it was expressly provided 'this act shall not apply to any action commenced on or before the date of enactment.' 15/
>
> 15/ The legislative history of the amendment makes it clear that "cases filed prior to the enactment of this bill shall proceed to final disposition under the law existing on the date they were commenced." S. Rep. No. 94-204, U.S. Code Cong. & Admin. News, 94th Cong., 2d Sess. 3173 (1976).

Since the present action was filed long before the three-judge court amendment, and the issues of unconstitutionality of housing conditions and inmate protection have been in litigation since 1971, § 2281 undeniably requires the

If the Costello rule is wrong, as we attempt to demonstrate below, it ought not be dismissed as of little importance based on the repeal of § 2281.

There is of course another dimension of importance of the case. From the point of view of the prisoners in the Florida prison system, this case presents an inexplicable failure of the courts to deal with plain violations of fundamental rights. The dissenting opinion called the decisions "a tragically wrong disposition of the claim of nearly 15,000 Florida state prisoners to be afforded simple humane treatment". 539 F.2d at 552-553. That is an appropriate description of a disposition that vacates an injunction even though a district judge and all fourteen sitting appellate judges agreed unanimously that the Cruel and Unusual Punishment Clause and the Due Process Clause were violated by the deprivation of basic medical care in conjunction with intolerable overcrowding. The propriety of that decision on the merits can hardly be doubted in view of the undisputed facts and settled law. Estelle v. Gamble, __ U.S. __; 45 U.S. Law Week 4023 (November 30, 1976); Newman v. Alabama, 503 F.2d 1320 (5th Cir. 1974), cert denied 421 U.S. 948 (1975); Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974); Goldsby v. Carnes, 365 F. Supp. 395 (W.D. Mo. 1973) (consent decree); Jones v. Wittenberg, 323 F. Supp. 93, 330 F. Supp. 707 (N.D. Ohio 1971) affirmed sub nom. Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972); Hamilton v. Love, 328 F. Supp. 1182

17/ (Con't.) convening of a three-judge court to grant permanent injunctive relief striking down statutory provisions which prohibit corrections officials from carrying out the duties imposed upon them by the United States Constitution.

Accordingly, we request the convening of a three-judge court consistent with Costello's holdings and the procedure therein approved."

Judged Keady then issued a temporary restraining order on prison overcrowding under 28 U.S.C. § 2284.

(E.D. Ark. 1971); Inmates v. Eisenstadt, 360 F. Supp. 676 (D. Mass. 1973), affirmed 494 F.2d 1196 (1st Cir. 1974), cert. denied, 419 U.S. 977 (1975); Detainees of the Brooklyn House of Detention for Men v. Malcolm, 520 F.2d 392 (2nd Cir. 1975); Rhem v. Malcolm, 507 F.2d 333 (2nd Cir. 1974).

II.

The Decision Below is in Conflict with Aprlicable Decisions of this Court

We believe that the Fifth Circuit has announced a novel and quite unworkable expansion of 28 U.S.C. § 2281. The injunction in Costello was based on a finding and conclusion that overcrowding in the Florida state prison system was unconstitutional because it prevented inmates from getting the essentials of medical care and it endangered their health and their lives. There was never a challenge to the constitutionality of any state statute, and never any decision on the constitutionality of any statute. Indeed the District Judge did not think that his order enjoined the enforcement of any statute.[18] But accepting, arguendo, the Court of Appeals conclusion that the injunction might force Mr. Wainwright to disregard a state law, it is still evident that the injunction was issued upon the ground of the unconstitutionality of the result obtained in the operation of the prisons, rather than upon the ground of the unconstitutionality of any statute. The decision below holds that three judges are required notwithstanding the fact that a state statute is involved in the case only at the level of relief, and the fact that the statutes' constitutionality is unquestioned. Moreover, the Fifth Circuit sees the three-judge requirement as shifting depending upon how the district judge formulates the remedy.

18/ ". . . this Court has not and will not require the defendant Wainwright to refuse to accept prisoners lawfully committed to his custody." 397 F.Supp. at 36. The statement was repeated at 397 F.Supp. 38. The district court thought that means existed within Florida law for Mr. Wainwright to reduce the inmate population. 397 F.Supp. at 35. For example the court pointed to Mr. Wainwright's power to liberalize the procedures for granting inmates an "extra good time allowance" under Section 944.29 of the Florida Statutes. See also Appendix, infra 33A-38A, concerning the defendants' ability to expand prison capacity. Since

The Fifth Circuit held that the district court's order requiring Mr. Wainwright to either reduce the number of prisoners or increase facilities so as to reach the emergency capaci- level and eventually the normal capacity level might require him to ignore a state law which required him to receive all lawfully committed prisoners. Florida Statutes: Section 839.21. The majority ruled that the relief "stretched beyond the limits of the defendants' authority" (339 F.2d at 550), even though the trial judge had twice stated that he would not require Wainwright to refuse to accept lawfully committed prisoners (397 F.Supp. at 36, 38), and the trial judge thought Mr. Wainwright did have state law powers sufficient to control the situation. 397 F.Supp. at 35. Nevertheless, the Fifth Circuit ruled that the order "condemns the operation of Wainwright's statutory responsibility" and that "If the order is to remain as written, it is beyond the jurisdiction of a single judge." 539 F.2d at 552. The court went on to acknowledge that no state statute was challenged as unconstitutional,[19] but thought that the "result reached" by the district court "creates the kind of event § 2281, was designed to protect against." 539 F.2d at 552. The Fifth Circuit made it clear that it thought the requirement of a three-judge court depended upon the relief to be granted by acknowledging that the case "did not start out as a three-judge case" (539 F.2d at 550),

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18/(Cont'd.) Florida statutes prohibited "any cruel or inhuman treatment of any prisoner by neglect or otherwise" (Florida Statutes Section 944.36) the district court orders might be seen as entirely consistent with, rather than opposed to, the Florida legislative scheme.

19/ The court said "A statute does not have to be directly challenged as unconstitutional on its face where the impact of a court order achieves the precise result requiring a three-judge court." 539 F.2d at 552.

and by framing a remand order which even now, permits the single district judge to frame relief for the constitutional violations so long as such relief does not nullify state statutes (539 F.2d at 552). Thus the district judge was directed to convene a three-judge court "if that is deemed appropriate under the circumstances" (Ibid.).

We submit that the decision below is in conflict with the principles set forth in this Court's decisions in Phillips v. United States, 312 U.S. 246, Ex Parte Bransford, 310 U.S. 354, and Swift & Co. v. Wickham, 382 U.S. 111. See also Butler v. Dexter, 425 U.S. 62. In those cases this Court held that 28 U.S.C. § 2281 did not require a three-judge court where a state statute was enjoined, if the injunction was not issued "upon the ground of the unconstitutionality of such statute." 28 U.S.C. § 2281.

In Phillips a court restrained a governor's lawless use of military power to interfere with the construction of a dam by the United States. This Court held that no three-judge court was required since the case did not involve an attack on the state laws which conferred upon the Governor the power to declare martial law, but only involved the misuse of his authority. The Court noted that the "crux" of Section 2281 was "procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy" 312 U.S. at 251. The opinion pointed out that the United States did not impugn the validity of the laws relied upon by the Governor to support his actions (Id. at 252.) and went on to state the following principles, which seem applicable to Costello:

> Some constitutional or statutory provision is the ultimate source of all actions by state officials. But an attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority even though a misreading of the statute is invoked as justification. At least not within the congressional scheme of §226 [now 28 U.S.C. §2281]. It is significant that the United States in its complaint did not charge the enabling acts of Oklahoma with unconstitutionality, but assailed merely the Governor's action as exceeding the bounds of law. In other words, it seeks a restraint not of a statute but of an executive action. But the enforcement of a "statute", within the meaning of § 266, is not sought to be enjoined merely because a state official seeks shelter under it by way of defense against a charge of lawlessness. As Mr. Justice Cardozo said of a related problem affecting the business of the federal courts, "we do not travel back so far." Gully v. First Nat. Bank, 299 U.S. 109, 116, 81 L.ed 70, 74, 57 S. Ct. 96.
>
> On its face, §266 precludes a reading which would bring within its scope every suit to restrain the conduct of a state official whenever, in the ultimate reaches of litigation, some enactment may be said to authorize the questioned conduct.
>
> * * *
>
> In other words, the complainant must seek to forestall the demands of some general state policy, the validity of which he challenges. 312 U.S. at 252-253.

If the crux of Section 2281 is procedural protection against improvident doom of a state legislative policy, then we ought to inquire what legislative policy is at stake in Costello. To be sure, the Florida statutes have permitted the result complained of by petitioners, but there is no particular Florida statute which mandates the unconstitutional overcrowding of the prisons or which is affronted by the district court's injunction that the prisons be operated within their capacities. The Costello injunction does not doom any policy legislated by Florida

statutes.

The Eighth Circuit applied the principle of Phillips to find no need for a three-judge court where Little Rock school officials were enjoined from leasing Central High School for private segregated operation (Aaron v. Cooper, 261 F.2d 97, 105-106 (8th Cir. 1958)) and where the Governor was enjoined from using the national guard to block school desegregation under court order (Faubus v. United States, 254 F.2d 797 (8th Cir. 1958)). The Eighth Circuit decisions conflict in principle with the Fifth Circuit's Costello decision. See also the Fourth Circuit decision holding that no three-judge court was required to enjoin school segregation even though a state pupil placement law was interposed in defense. School Board of City of Newport News v. Atkins, 246 F.2d 325 (4th Cir. 1957), cert. den. 355 U.S. 855 (1957).

In Ex Parte Bransford, 310 U.S. 354, the Court held that a three judge court was not required to consider a suit involving local taxation of a national bank because the injunction against the taxes was not sought upon the ground of the unconstitutionality of the state law. Insofar as Bransford involved an attempt to tax property which was exempted by federal statute it was said to concern the superiority of federal over state laws under the Supremacy Clause, as distinguished from the "constitutionality" of the state enactment. Insofar as Bransford involved a claimed discriminatory misapplication of the local tax law by assessors the Court also held that no three-judge court was required. "Such assessments, if made and if invalid, are so because of a wrong done by officers under the statute rather than because of the requirement of the statute itself."

Bransford, supra, 310 U.S. at 359. The Court wrote:

> It is necessary to distinguish between a petition for injunction on the ground of the unconstitutionality of a statute as applied, which requires a three-judge court, and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional. The latter petition does not require a three-judge court. In such a case the attack is aimed at an allegedly erroneous administrative action. Until the complainant in the district court attacks the constitutionality of the statute, the case does not require the convening of a three-judge court, any more than if the complaint did not seek an interlocutory injunction.
> (310 U.S. at 361; footnotes omitted)

In Costello as in Bransford it is the result obtained by the use of official powers which is attacked as unconstitutional. The injunction regulates the conditions within the prisons, not the Florida statute law. The conditions in the prisons which are sought to be regulated in this case are not directly attributable to any particular Florida statute. As the Court in Bransford said:

> Even where the statute is attacked as unconstitutional, § 266 is inapplicable unless the action complained of is directly attributable to the statute. There is no indication that Congress sought by § 266 to have every attack on the constitutionality of a state statute determined by a three-judge court.
> (310 U.S. at 361-362; footnote omitted)

Last term in Butler v. Dexter, 425 U.S. 62, the Court held that a three-judge court was not required where state officials acted unconstitutionally, using a statute as a pretext, since the case would not present any substantial question concerning the constitutionality of that statute. The court relied on Phillips and Bransford, supra, as well as Bailey v. Patterson, 369 U.S. 31. In

Costello as in Butler and Bailey, supra, there is no substantial question concerning the constitutionality of any state statute. It is quite evident from a reading of the opinions below in Costello that the merits were determined by testing the conditions of the prisons against the requirements of the Constitution, but that there was no process of testing any state statute against the commands of the Eighth or Fourteenth Amendments.

In Swift & Co. v. Wickham, 382 U.S. 111, the Court held that three judge courts are not required in Supremacy Clause cases involving federal-state statutory conflicts. The Court decided that in Section 2281 the phrase "upon the ground of the unconstitutionality of such statute" should be read to confine the three-judge court requirement to those cases where the injunction against a state statute depends "directly upon a substantive provision of the Constitution, leaving cases of conflict with a federal statute (or treaty) to follow their normal course in a single-judge court." 382 U.S. at 127.

The Fifth Circuit's Costello rule is based on an assumption, which we accept arguendo, that there is a conflict between the district court's remedial decree and one or more state statutes. We submit that this kind of conflict is akin to the Supremacy Clause issues in Swift and Bransford, supra. If Mr. Wainwright was ordered to accomplish a result which can be accomplished only if he ignores state law, the state law was overridden because of the supremacy of the district court's remedial power to enforce the Constitution. Such an incidental and probably temporary effect on state law, does not constitute an injunction restraining the enforcement of the law "upon the ground of the unconstitutionality of such statute." 28 U.S.C. §2281.

A number of federal courts have issued remedial orders which had the arguable effect of overriding state laws. In a number of the cases the three judge problem is not discussed, but it was dealt with by Judge Merhige in the Richmond, Virginia school desegregation case involving the question of interdistrict relief. Bradley v. School Board of City of Richmond, 324 F. Supp. 396 (E.D. Va. 1971), subsequent injunction, 338 F. Supp. 67 (E.D. Va. 1972), reversed on other grounds, 462 F.2d 1058 (4th Cir. 1972), affirmed by equally divided court, 412 U.S. 92 (1973).

Judge Merhige found no three judge court necessary because the validity of the state law was not in question and its possible disregard was merely a remedy for a constitutional violation. 324 F. Supp. at 400.[20/] Judge Merhige pointed to examples of similar rulings in other courts, e.g. United States v. Duke, 332 F.2d 759 (5th Cir. 1964) (voting rights) and Haney v. County Board of Education of Sevier County, 429 F.2d 364 (8th Cir. 1970) (school desegregation). The Seventh Circuit approved an injunction which set aside a state law for remedial purposes in Gautreaux v. Chicago Housing Authority, 342 F. Supp. 827, 830 (N.D. Ill. 1972), affirmed 480 F.2d 210 (7th Cir. 1973), cert. den. 414 U.S. 1144 (1974). See also United States v. Greenwood Municipal Sep. School Dist., 406 F.2d 1086, 1094 (5th Cir. 1969) ("local teacher hiring statutes may not be interposed to frustrate a constitutional mandate."), and United States v. Board of Ed. of City of Bessemer, 396 F.2d 44, 51 (5th Cir. 1968) (similar).

The United States, as amicus curiae in the court below, argued quite persuasively that cases such as United States v. Duke, supra, where a court used equitable powers to "freeze" or temporarily

20/ The three judge court issue was argued in the briefs before the Fourth Circuit, but was not mentioned in the opinion of that Court. Bradley, supra, 462 F.2d 1058.

suspend enforcement of a statute without holding it unconstitutional ought not be treated as three judge cases. The United States also argued that the need for three judges "should be determined at the outset of litigation ... not in its midst." Brief of United States, p. 71. The Court in Swift & Co. v. Wickham, supra, 382 U.S. at 124, pointed to the purpose of section 2281 to expedite and not delay important litigation. But the Fifth Circuit's Costello rule will invariably delay litigation. In complex cases where the remedy stage extends for a period of years or months, judges will often experiment with remedies, and choose remedies which trench upon state law or violate state laws as remedies of last resort after other efforts have failed. A doctrine such as Costello, which requires a three judge court to consider the entire case including liability issues ab initio, requires a duplication of effort which is quite at war with the purpose to expedite such cases. We submit that cases of conflict between the federal remedial power and state statutes should be governed by the doctrine of Swift & Co. v. Wickham, 382 U.S. 111, and treated as essentially Supremacy Clause cases which do not involve the constitutionaltity of state laws within the meaning of section 2281.

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III

The Repeal of Section 2281 Should Preclude the Convening of A New Three Judge Court in a Case Which Was Properly Commenced Before A Single Judge.

After the en banc argument of this case but before decision, the Congress on August 12, 1976, enacted Public Law 94-381, repealing 28 U.S.C. §2281. Section 7 of Public Law 94-381, provides that the act "shall not apply to any action commenced on or before the date of enactment". The en banc opinion of the Court of Appeals did not mention the repeal of section 2281, but proceeded to decide the case on the assumption that statute was fully applicable. The dissenting judges did not disagree that section 2281 was applicable in view of section 7, which they called a "savings clause", but they stated that expansion of section 2281 was unwarranted "with such a clear indication of Congressional purpose to abolish three-judge courts in this type of litigation completely." 539 F.2d at 554.

We submit that notwithstanding the so called savings clause, the Court of Appeals should have held section 2281 inapplicable to this case because of the principle "that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." Bradley v. School Board of City of Richmond, 416 U.S. 697, 711; Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268; United States v. Schooner Peggy, 1 Cranch 103.

We believe that properly construed there is no legislative direction that section 2281 should continue to apply after its repeal in a case such as Costello which was properly commenced before a single judge in 1971, and which only belatedly is argued

to require three judges in remedial proceedings which will resume and continue after the repeal of section 2281. A decision that Section 2281 is inapplicable to Costello would be consonant with the Congressional purpose to relieve the burden of three judge courts, and remove procedural uncertainties. These purposes are stated in the Senate Report:

> "There are four major reasons for enacting this legislation which would eliminate the requirement of three-judge courts in all cases except those involving reapportionment or where required by congressional enactment. They are: (1) to relieve the burden of three-judge court cases, which have increased in number from 129 in 1963 to 320 in 1973, causing a considerable strain in the workload of Federal judges; (2) to remove procedural uncertainties that exist under the present ambiguous three-judge court practices; (3) because statutory and rules changes have eliminated the original reasons for the establishment of three-judge courts; and (4) because decisional law has provided its own safeguards against precipitous injunctive action by Federal judges."
> (S.Rep. No. 94-204, U.S. Code Cong. & Admin. News, 94th Cong. 2nd Sess. 3162-3163.)

The legislative history contains no explanation[21] of section 7, except the following statement in the section-by-section analysis:

> Section 7. - This section provides that the act shall not apply to any action commenced on or before the date of enactment. It is merely added to make clear that cases filed prior to the enactment of this bill shall proceed to final disposition under the law existing on the date they were commenced.

Section 7 is understandable in view of the principle that the three-judge court requirement of section 2281 was a jurisdictional limitation on the power of the courts. Section 7 would

21/ There is no further explanation of the savings clause in the House Report, the hearings, or the floor debate. See House Report No. 94-1379, July 30, 1976 [To accompany H.R.6150]; Hearings Before the Subcommittee on Improvement in Judicial Machinery, Senate Judiciary Committee, 92nd Cong. 2nd Sess. on S.1876, Part 2; Hearing before the Subcommittee on Courts, Civil Liberties and the Administration of Justice, House Judiciary Committee, 93rd Cong. 2nd Sess. on S.271, Serial No. 27; Cong. Record June 20, 1975, pp. S11111-11112; Cong. Rec. July 30, 1976, p.H8102; Cong. Rec. Aug. 2, 1976, pp. H8143-8145; Cong. Rec. June 14, 1973; pp. S 19557-19558.

provide a simple effective date which would not disrupt the jurisdiction of three-judge courts already considering pending cases. Cases already before three judges would "proceed to final disposition." But there is no indication that Congress in enacting Public Law 94-381, contemplated the complications which might be caused by the Fifth Circuit's Costello doctrine, which was announced subsequent to the congressional enactment. Congress had no reason to expect that following the repeal new three-judge courts would be ordered in four and six year old cases (as in Costello and Gates v. Collier, supra) unless they were improperly commenced before a single judge. But, the Costello rule requires a three-judge court at the remedial stage of the case. The Fifth Circuit has acknowledged that the Costello case was properly commenced[22] before a single judge court, and only belatedly and conditionally has come to require a three judge court. 539 F.2d at 550, 552.

This Court should apply the Bradley-Thorpe-Schooner Peggy line of decisions, supra, to avoid a plain frustration of the Congressional policy of abolishing three-judge courts for this type of case. Congress had no reason to expect a new judicially created doctrine would expand section 2281 in such a way as to create an indeterminate number of new three-judge courts far into the future and long after August 12, 1976, the date of repeal. The Congressional policy will be best served by a rule, which limits the applicability of Section 2281 to cases which were or should have commenced before three-judge courts in accordance with three-

22/ The Fifth Circuit said of Costello, that "This case did not start out as a three-judge case". 539 F.2d at 550.

judge court practice as it existed on August 12, 1976. The Fifth Circuit's subsequent expansion of the three-judge practice, in Costello, should yield to the Congressional policy expressed in Public Law 94-381.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals should be reversed insofar as it vacated the injunction issued by the district court, and the case remanded for further proceedings in accordance with the decision of the Court of Appeals affirming the order of the district court on the merits of the cause.

Respectfully submitted

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-5920

MICHAEL V. COSTELLO, and
ROBERTO K. CELESTINEO, and
others similarly situated,

Petitioners,

vs.

LOUIE L. WAINWRIGHT, Director
of the Division of Corrections,
State of Florida, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-5920

MICHAEL V. COSTELLO, and
ROBERTO K. CELESTINEO, and
others similarly situated,

Petitioners,

vs.

LOUIE L. WAINWRIGHT, Director
of the Division of Corrections,
State of Florida, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATUTES INVOLVED

Two of the Florida Statutes provided in the Petition for Writ of Certiorari were amended in 1974. The amendments are not substantial and do not affect this case. The amended statutes are provided below:

Section 944.291 Prisoner released by reason of gain-time allowances.-

(1) A prisoner who has served his term or terms, less allowable statutory gain-time deductions and extra good-time allowances, as provided by law, shall, upon release, be under the supervision and control of the [Department of Offender Rehabilitation] as if on parole, but in no event shall such supervision extend beyond the maximum term or terms for which he was actually sentenced.

(2) The provisions of this section shall not apply to prisoners who, at the time of sentence, could not have earned at least 180 days' gain-time.

Section 945.09 Commitment of prisoners; classification; reception and classification program; transfer.-

(1) All prisoners sentenced to the state penitentiary shall be committed by the court to the custody of the [Department of Offender Rehabilitation].

(2) All prisoners committed to the custody of the [department] shall be conveyed to such institution, facility, or program in the correctional system as the [department] shall direct, in accordance with the [department's] classification scheme. The [department] shall establish a program of graduated punishment [with the following classification of inmates]:

(a) Class I.- Incorrigible inmates for whom a total lockup will be required; facilities shall include, but not limited to, a portion of the Florida State Prison;

(b) Class II.- An intermediate class between Class I and Class II for those inmates who have had difficulty in the system but who have not yet proven themselves to be incorrigible;

(c) Class III.- Inmates for whom there exists hope of rehabilitation.

(3) Each prisoner shall be processed through a reception and evaluation program in the area where the prisoner was committed or where he was incarcerated.

(4) Pursuant to such regulations as the [department] may provide, the [department] is authorized to transfer prisoners from one institution to another institution in the correctional system and to classify and re-classify prisoners as circumstances may require.

SUMMARY OF THE ARGUMENT

1. The Fifth Circuit's decision in this case will arguably affect only a handful of similar cases: cases involving major system-wide challenges to a state's prison system. Suits involving local jails will not require three judges because those cases do not involve statewide injunctions. The vast majority of pro se prisoner complaints will not require three judges because those cases are individual in nature and do not seek statewide relief.

2. The Fifth Circuit's decision is squarely in accord with this Court's decisions. Petitioners in this case sought and obtained an injunction against Defendants requiring Defendants to release thousands of sentenced prisoners contrary to the unequivocal mandate of Florida statutes requiring that such inmates be incarcerated in the custody of Defendants. The basis for the injunction was that continued obedience to those statutes (mandating that Defendants take custody of sentenced prisoners and maintain that custody until expiration of sentence) caused Petitioners to be subjected to cruel and unusual punishment due to the relationship between prison population, prison capacities, and medical care. This Court has frequently ruled that a three-judge court is needed to hear a request to enjoin the execution of a state statute because unconstitutional as applied.

3. The repeal of 28 U.S.C. §2281 on August 12, 1976, does not apply to the case at bar which was filed long before August 12, 1976.

STATEMENT OF THE CASE

Several matters require clarification. First, the preliminary injunction entered in this case against Defendants was written in absolute terms without any limiting reference to the legal power of Defendants. Costello v. Wainwright, 539 F.2d 547, 550 and n.12 (5th Cir. en banc 1976). The preliminary injunction provided:

> That, within one year of the date of this order and preliminary injunction, the defendants are hereby required to reduce the overall inmate population of the Florida Division of Corrections (or its successor agency, if any) to "emergency capacity" (as that term is defined by the 1972 Technical Assistance Report prepared for the Florida Division of Corrections by the American Justice Institute entitled "Overcrowding in the Florida Prison System") in the following stages:
> (a) Within 90 days of the date of this order and preliminary injunction, the inmate population of the Florida Division of Corrections shall be reduced to 2,000 inmates above "emergency capacity".
> (b) Within 150 days of the date of this order and preliminary injunction, the inmate population shall be reduced to 1,500 inmates above "emergency capacity".
> (c) Within 210 days of the date of this order and preliminary injunction, the inmate population shall be reduced to 1,000 inmates above "emergency capacity".
> (d) Within 270 days of the date of this order and preliminary injunction, the inmate population shall be reduced to 500 inmates above "emergency capacity".
> (e) Within 365 days of the date of this order and preliminary injunction, the inmate population shall be reduced to "emergency capacity".
>
> * * * * * * * *
>
> ORDERED AND ADJUDGED:
> That by December 1, 1976, the defendants shall reduce the overall inmate population of the Florida Division of Corrections to "normal capacity", that is, that population which the institutions of the Florida Division of Corrections can properly accommodate on an average daily basis. (E.S.)

The Fifth Circuit, sitting en banc, ruled that the preliminary injunction could only be issued by a three-judge court. The Fifth Circuit reasoned:

> By accepting lawfully committed prisoners, Wainwright would only be subjecting them

> to an environment of constitutional deprivation. To refuse to accept further prisoners would contravene statutory law. Under these circumstances the district court Order condemns the operation of Wainwright's statutory responsibility. 539 F.2d at 551-552.

The Fifth Circuit concluded:

> If a court order is to be entered which requires action of these defendants which will violate Florida laws on the ground that compliance with the law would be unconstitutional, then a three-judge court should be convened. 539 F.2d at 549.

Upon remand the Fifth Circuit expressly stated that the case would not have to start all over again. "The record amassed in the single-judge proceeding could of course be used in any three-judge consideration of this case." 539 F.2d at 549 n.8. The Fifth Circuit's mandate provided:

> The case is remanded to permit the district court to grant only such relief against these defendants as they can provide without nullification of state statutes, and to request the convention of a three-judge court if that is deemed appropriate under the circumstances. 539 F.2d at 552.

The trial court personally visited one Florida institution, the inmate reception center at Lake Butler, Florida. When the trial court appended to its order a photograph of one cell at the reception center, however, the court intended only to indicate that that cell was typical of the 68 such cells at the reception center. The court found that such cells housed transient inmates, who were being classified and then transferred to other institutions. The cells did not house permanent inmates. The court did not find such cells to be typical of cells throughout the Florida prison system. Florida now has 18 correctional institutions (the reception center at Lake Butler is one), 24 community correctional centers, 11 road

prisons, 7 local adjustment centers for women, 10 mental health and drug facilities, and 3 vocational centers.

Petitioners recite passages from a pretrial stipulation entered into between the parties, but do not clearly point out that Defendants did not concede the constitutional issues by stipulation. The stipulation was primarily concerned with a health care study (the Babcock report) and was intended to move the case to a full trial. Defendant Wainwright acknowledges that, in the best of all possible worlds and with a comfortable budget, he would like to implement many portions of the Babcock report, but he has not conceded, stipulated, or in any way agreed that the Babcock report establishes minimum or constitutional standards of health care. The stipulation reads:

> The parties further recognize that the Babcock Commission Report as modified by the Response of the Division of Corrections describes necessary improvements to the delivery of medical services within the prison system which, if implemented, would either:
>
> (A) Create guidelines for adequate medical care (Defendants' position), or
>
> (B) Be a major factor in minimal constitutional standards (Plaintiffs' position). (E.S.)

The positions of the parties are separately stated because the constitutional issues were to be litigated, not stipulated.

ARGUMENT

Reasons for Denying Review by Certiorari

Petitioners have offered this Court three illogical and unsound arguments for the Court to review the en banc decision of the Fifth Circuit in this case.

At bottom, and in apparent recognition that their arguments are not strong, Petitioners make an equitable claim that the courts in this case have failed to deal with "plain violations of fundamental rights." Defendants believe the trial court's preliminary findings on May 22, 1975, were precipitous and not based upon a thorough survey of all Florida's correctional institutions in 1975, but rather were based upon data compiled in 1973. (These preliminary findings were, however, affirmed by the Fifth Circuit "to the extent they would support the granting of appropriate single-judge relief.")

Defendants fully intend to present more evidence upon return to the trial court with respect to the preliminary findings. In particular, circumstances have changed substantially since May, 1975. Defendants have not been idle in the months that it has taken to secure the right to try the constitutional issues in this case before three judges. A comprehensive space utilization survey has been conducted to inventory all of the space of the corrections facilities in Florida and to establish standards for design and maximum capacities correlated with augmented staffing for each institution. This is the first time such data has been available in this case. Also, two legislatures have met since the May 22, 1975, Order was entered. Although the inmate population increased by 4,404 inmates since the last population figure submitted to the trial court (on June 13, 1975), the

1975 Legislature appropriated $23,000,000 for new construction and renovation of prison facilities. $53,000,000 was appropriated in 1976. These construction programs are moving rapidly forward. Moreover, several health care surveys have recently been completed to provide far more up-to-date information than the survey heretofore relied upon by the trial court (the Babcock Report, filed December 19, 1973). The Florida corrections system currently has authorized positions for 26 medical doctors, 15 psychiatrists, and 39 psychologists, and relies as well on outside medical care on a contract basis. Of the authorized positions, only two psychiatrist positions and three psychologist positions are currently vacant. (Compare Estelle v. Gamble, 45 U.S. Law Week 4023, 4027 n.2, November 30, 1976, Stevens, J., dissenting. [Texas described as having 1 to 3 doctors to care for 17,000 inmates with occasional part-time help.])

These, of course, are evidentiary matters to be presented to the trial court. Petitioners advocate that Florida still has not done enough. But this Court should not be left with the impression that granting review of this decision will enable the parties to return to the trial court more quickly or will more speedly determine whether Florida's correctional system in 1977 is "deliberately indifferent" to the serious medical needs of Petitioners. Estelle v. Gamble, supra, 45 U.S. Law Week at 4025.

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I.

THE EN BANC FIFTH CIRCUIT DECISION IN THIS CASE WILL ARGUABLY AFFECT ONLY A HANDFUL OF PENDING CASES: THOSE MAJOR CASES WHICH INVOLVE STATEWIDE CHALLENGES TO THE ADMINISTRATION OF A STATE'S CORRECTIONAL SYSTEM.

Petitioners have strained mightily to make this case into what it is not. By a cursory analysis of statistics, Petitioners imply that the en banc decision of the Fifth Circuit will flood this Court with direct appeals from pro se prisoner civil rights cases. Such doomsday predictions are unfounded and completely illogical.[1]

Petitioners would have this Court believe that the sweeping remedies sought in the case at bar are typical of the normal pro se prisoner lawsuit. This case seeks nothing less than a complete federal court audit (and subsequent administration) of major aspects of Florida's correctional system, including release of prisoners, housing of inmates, staffing, and delivery of medical care. Reallocation of appropriations and sale of state lands no doubt also will be demanded.[2]

Only a handful of states have a case like Costello, and one can be sure that in those few states there is only one such major prison case. The case at bar is to be distinguished from similar cases brought at the local level with regard to county or city jails. Local jail cases are matters of purely local concern, do not involve statutes of statewide effect, and

[1] Though the number of three-judge cases is of course of serious concern to this Court, the number should not be exaggerated. Swift & Co. v. Wickham, 382 U.S. 111, 128 and n.26, 15 L.Ed.2d 194, 206 and n.26, 86 S.Ct. 258 (1965).

[2] See pp. 33-34, supra.

thus do not require three judges.[3] Cf. Wolff v. McDonnell, 418 U.S. 539, 542 n.1, 41 L.Ed.2d 935, 943 n.1, 94 S.Ct. 2963 (1974); Moody v. Flowers, 387 U.S. 97, 18 L.Ed.2d 643, 87 S.Ct. 1544 (1967).

To make their doomsday predictions, Petitioners have taken some substantial liberties with the caseload statistics compiled in the 1976 Annual Report of the Director, Administrative Office of the United States Courts. For example, Petitioners claim that there are 577 class action prisoner civil rights suits pending in the district courts of the nation, and 315 such cases pending within the Fifth Circuit district courts. Those figures, however, represent only cases in which a class action has been alleged.[4] The figures do not represent the number of active class actions which have actually been certified as such by the trial court.[5]

Inmate civil rights suits are characteristically very personal in nature and do not seek statewide changes. Typically an inmate pro se complaint is concerned solely with his discipline, classification, inter-prison transfer, mail, medical appointments and treatment, or personal property. Such individual suits are not by any stretch of the imagination a proper subject for a three-judge court. The Florida Attorney General's Office presently has 412 pending prisoner civil rights

[3] See, e.g., Inmates, D.C. Jail v. Jackson, 416 F.Supp. 119 (D. D.C. 1976); Miller v. Carson, 401 F.Supp. 835 (M.D. Florida, 1975); Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1974); Detainees of Brooklyn H. of Det. for Men v. Malcolm, 520 F.2d 392 (2d Cir. 1975); Taylor v. Sterrett, 344 F.Supp. 411 (N.D. Tex. 1972); Hamilton v. Love, 328 F.Supp. 1182 (E.D. Mo. 1973); Hamilton v. Schiro, 338 F.Supp. 1016 (E.D. La. 1970); Inmates of Suffolk County Jail v. Eisenstadt, 360 F.Supp. 676 (D. Mass. 1973); Jones v. Wittenberg, 323 F.Supp. 93 (N.D. Ohio 1971); Incarcerated Men of Allen County Jail v. Fair, 507 F.2d 281 (6th Cir. 1974).

[4] 1976 Annual Report of the Director, Table 38, pp. 119-120.

[5] Moreover, Petitioners do not explain how one can predict three-judge court status from a bare allegation of class action.

cases. Only one of these, the case at bar, is a three-judge court case; no demand for a three-judge court is intended or appropriate in any of the other cases.

The overwhelming majority of prisoner civil rights cases are uncomplicated and are terminated by the court before pretrial conference. Of 5,793 prisoner civil rights cases terminated in FY 1976 by court action, 5,277 prisoner cases were ended before pretrial conference.[6] Only 258 prisoner civil rights cases were terminated by trial in FY 1976, or 4.4% of the cases terminated.[7]

Thus, of the 6,341 prisoner cases cited by Petitioners which were pending on June 30, 1976,[8] very few seek the kind of sweeping relief that is sought herein. Nearly all of those 6,341 cases will remain individualized cases, local in character, and will not require three-judges.

Petitioners assert that the Fifth Circuit in this case has unreasonably expanded the three-judge court statute, and claim that the case at bar is part of a trend in the Fifth Circuit that originated with the Fifth Circuit's en banc 1973 three-judge prison decision, Sands v. Wainwright, 491 F.2d 417 (5th Cir. 1973), cert. den. sub. nom., Guajardo v. Estelle, 416 U.S. 992 (1974). If Petitioners' catastrophic predictions were correct, the statistics since 1973 should show a significant increase in three-judge courts hearing prisoner cases. Nationwide, however, there were only 3 three-judge courts convened in FY 1974 to hear prisoner petitions.[9] In FY 1975, there were 9 such courts; and in FY 1976, there were

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[6] 1976 Annual Report of the Director, Table C4, p. I-25.

[7] Ibid.

[8] Ibid, at Table C3A, pp. I-20 and I-21

[9] Ibid, at Table 37, p. 116.

(5)

only 7 three-judge courts to hear prisoner petitions.[10] Moreover, there has been a decrease in FY 1976 in three-judge courts convened to hear general civil rights suits. In FY 1974 there were 171 such courts, 192 were convened in FY 1975, and 161 were convened in FY 1976.[11]

If it were true that the Fifth Circuit has been cavalier in its construction of the three-judge court statute, the statistics would show that trend also. But in FY 1976, the Fifth Circuit heard 133 appeals in prisoner civil rights cases (out of the 619 heard nationally)[12] and in only two[13] to our knowledge, did the Fifth Circuit rule that a three-judge court was required.

The case at bar therefore is not a typical prisoner civil rights case. One reasonably can expect that the three-judge court decision in this case will only have application to a handful of similar major statewide attacks upon other state prison systems. Gates v. Collier, 407 F.Supp. 1117 (N.D. Miss. 1975) is an example.[14] Gates v. Collier, is a massive attack upon Mississippi's prison system.

Furthermore, assuming arguendo that the decision in this case will apply to a few major prison suits, it does not

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[10] Ibid. The Annual Report of the Director does not report the number of prisoner petition three-judge courts in the Fifth Circuit in FY 1976.

[11] Ibid.

[12] Id., at Table B7, p. I-10. The Fourth Circuit led the nation in appeals from prisoner civil rights cases, hearing 185 appeals.

[13] Costello v. Wainwright, 539 F.2d 547 (5th Cir. 1976); Morales v. Turman, 535 F.2d 864 (5th Cir. 1976).

[14] It is still not at all certain that Gates will require three judges. As of January 17, 19777, the attorney of record for Mississippi advises us that no three-judge court has yet been convened, although Judge Keady made his request on November 19, 1976. Mississippi intends to move to dissolve any three-judge court because Mississippi's prison population has declined since November 19, 1976.

inevitably follow that all portions of those cases must be reviewed by this Court on direct appeal pursuant to 28 U.S.C. §1253. This Court's direct appellate jurisdiction is narrowly confined to three-judge court orders granting injunctive relief or denying such relief after a resolution of the constitutional claim. MTM, Inc. v. Baxley, 420 U.S. 799, 43 L.Ed.2d 636, 95 S.Ct. 1278 (1975). Furthermore, not all aspects of such litigation need to be litigated before three judges. For example, the damages portion of a suit may be remanded to a single judge for decision. See, e.g., Lavine v. Milne, ____U.S.____, 47 L.Ed.2d 249, 254 n.5 (1976). Indeed, that is precisely what has occurred in the case at bar. The Fifth Circuit remanded this case to the trial court to determine what single-judge relief would be appropriate and to request convention of a three-judge court for three-judge relief. Costello v. Wainwright, 539 F.2d 547, 552 (5th Cir. 1976). Issues in three-judge cases which are properly triable only before a single judge are appealable only to the Circuit Court of Appeals. Perez v. Ledesma, 401 U.S. 83, 27 L.Ed.2d 701, 91 S.Ct. 674 (1971).[15]

In summary, the Fifth Circuit's decision in this case will arguably affect only a few major prison suits. With the repeal of 28 U.S.C. §2281, the decision has no impact on future cases. The decision is not, therefore, sufficiently important to warrant review by certiorari.

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[15] Admittedly, however, this Court has accepted direct appellate jurisdiction of single-judge issues if such issues are factually related to the three-judge claim and decided by three judges. See, e.g., Allee v. Medrano, 416 U.S. 802, 40 L.Ed.2d 566, 94 S.Ct. 2191 (1976); Philbrook v. Glodgett, 421 U.S. 707, 44 L.Ed.2d 525, 95 S.Ct. 1893 (1975). But it is also true that this Court has historically interpreted 28 U.S.C. §1253 as evidencing a Congressional policy of minimizing this Court's mandatory docket, MTM, Inc. v. Baxley, supra, 420 U.S. at 803, and it would be entirely consistent with that tradition for the Court to construe 28 U.S.C. §1253 as limited to appeals from orders granting injunctive relief based upon resolution of issues which were triable only before three judges.

II.

THE FIFTH CIRCUIT'S DECISION IN THIS CASE IS SQUARELY IN ACCORD WITH DECISIONS OF THIS COURT.

Petitioners argue that the preliminary injunction in this case did not involve a challenge to any state statute, but merely addressed "the conditions" in the state prison system. What Petitioners are doing is confusing the remedy demanded (release of prisoners) with the basis for such remedy.

The trial court ruled that imprisonment in the custody of Defendant Wainwright constitutes cruel and unusual punishment because of the interrelationship found between prison space, prison population, and delivery of medical care. Imprisonment is mandated by the legislature of Florida through several statutes of statewide application. (These statutes make the Costello case distinguishable from Morales v. Turman, 535 F.2d 864 (5th Cir. 1976), petition for certiorari filed as No. 76-5881, December 16, 1976.) The relief sought by Petitioners herein was an injunction against the execution of those statutes because (it was alleged) imprisonment pursuant to those statutes deprives Petitioners of their right not to be subjected to cruel and unusual punishment ("overcrowding").[16]

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[16] "By accepting lawfully committed prisoners, Wainwright would only be subjecting them to an environment of constitutional deprivation. To refuse to accept further prisoners would contravene statutory law. Under these circumstances the district court Order condemns the operation of Wainwright's statutory responsibility." Costello v. Wainwright, 539 F.2d 547, 551-52 (5th Cir. 1976).

A.

The Intent and Effect of the Preliminary Injunction

The May 22, 1975, preliminary injunction in this case has the inescapable effect[17] of requiring Defendant Wainwright either to refuse to accept custody of newly convicted and sentenced prisoners or prematurely release thousands of sentenced felons. Release of prisoners is exactly the relief requested by Plaintiffs and exactly what the trial court intended to accomplish. The record directly contradicts Petitioners' assertion that the preliminary injunction "may not" require the release of prisoners or was not intended by the court to have that effect.

Release of prisoners (or closing the prisons to new prisoners, which is the same thing) is precisely what the Plaintiffs demanded. Plaintiffs filed three motions for a preliminary injunction to restrain Defendants from accepting new inmates.[18] The Second Amended Complaint now before the trial court asks the court to reduce prison population.[19] The motion filed on April 21, 1975 (which was the catalyst for the preliminary injunction) was entitled: "Renewal of Application for Injunction to Close Prisons to Additional Entrants"[20] That motion asked " . . . that this Honorable Court will consider this matter and will enter its order immediately closing Florida's prisons to new entrants and

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17 Resolution of the narrow issue of whether the preliminary does in fact order Defendant to release prisoners is hardly important enough for this Court to grant the writ of certiorari. The important issue is whether the en banc Fifth Circuit decision is consistent with three-judge court opinions of this Court; to resolve this issue it should be assumed that the preliminary injunction does in fact require the release of prisoners.

18 These motions were filed February 8, 1973, March 1, 1973, and April 21, 1975. Costello v. Wainwright, 397 F.Supp. 20, 22 (M.D. Fla. 1975).

19 Costello v. Wainwright, 397 F.Supp. at 21.

20 Ibid.

requiring that, within a reasonable time, the current population be reduced to acceptable levels as shall be determined by the Court."[21] (E.S.)

Plaintiffs got exactly the remedy that they requested. The trial court made it very plain in the first two sentences of its preliminary injunction that the preliminary injunction was intended to grant the same relief which had been requested by Plaintiffs:

> This cause came before the Court with respect to the plaintiffs' renewal of application for injunction to close prisons to additional entrants, filed herein April 21, 1975. The plaintiffs seek to have this Court close Florida's prison system to additional entrants and, in addition, require that the current inmate population be reduced to acceptable levels consistent with constitutional standards. For the reasons set forth below, the Court will require the defendants to lower the inmate population of the Division of Corrections to so-called "emergency capacity" within one year of the date of this order and preliminary injunction and to normal capacity by December 1, 1976. (E.S.) Costello v. Wainwright, 397 F.Supp. 20, 21 (M.D. Fla. 1975).

It is true that the trial court somewhat equivocally disclaimed that it was ordering Appellant Wainwright to refuse to accept prisoners lawfully committed to his custody, but also cryptically added in the same breath that Defendant " . . . may use whatever means within his control, consistent with his constitutional and statutory obligations, to comply with this Court's injunction." (E.S.) Costello v. Wainwright, 397 F.Supp. 20, 36 (M.D. Fla. 1975). If the trial court is correct that incarceration in Florida prisons is cruel and unusual punishment, then to remain "consistent with his constitutional obligations" Defendant

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21 As recently as December 10, 1976, Plaintiffs again moved in the trial court for a preliminary injunction to reinstate the time-table reduction in prison population contained in the May 22, 1975, preliminary injunction.

Wainwright must not accept (or must release) prisoners. The trial court's disclaimer thus is not something upon which the Defendant may safely rely.[22]

But there is more evidence in the record as to the intent and effect of the preliminary injunction. On June 10, 1975, the Fifth Circuit remanded this case to the trial court for hearings to determine if in fact Defendants could comply with the preliminary injunction. Defendants had only two options: expand prison capacity or release prisoners. After two days of hearings the trial court found as a matter of fact that it is completely beyond the lawful power of Defendants to expand prison capacity to comply with any stage of the preliminary injunction.[23] The trial court found: "The Florida prison system will not have the emergency capacity to house the number of inmates, 15,112, it anticipates will be confined in the first stage of the court's order (August 20, 1975) at any time during the operative portion of the order."[24] The trial court also stated" "While relief of overcrowding cannot be accomplished by the construction of new facilities, either by traditional methods requiring three to five years or the untried modular method requiring eight to twelve months, the

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22 "The argument that discretionary discharges and facility control within the Director's legal power are sufficient to permit compliance with the Order without Florida law violation must fail because the district court's Order is written in absolute terms without limiting reference to the legal power of these defendants." (E.S., footnote omitted.) Costello v. Wainwright, 539 F.2d 547, 550 (5th Cir. 1976).

23 A great amount of testimony is in the record describing the Defendants' efforts to enlarge the capacities of Florida's many correctional institutions, and indeed the trial court stated that Mr. Wainwright was to be highly commended for his use of innovative techniques. 397 F.Supp. at 34-35. Defendant Wainwright of course cannot build new prisons unless the legislature enacts legislation to tax the people, raise the revenues, and appropriate those revenues to the construction of new prisons.

24 (E.S.) Unpublished Findings of Fact and Conclusions of Law, June 27, 1975, p. 5 (Petitioners' Appendix, p. 33A).

Defendants' obligation to eliminate existing unconstitutionalities is not obviated by that fact."[25]

Since Defendant Wainwright cannot further expand prison capacity, he can comply with the preliminary injunction only[26] by refusing to accept duly sentenced felons or by premature release of inmates now in his custody.

B.

The Preliminary Injunction "Restrains the operation and execution" of major State statutes because allegedly unconstitutional as currently applied.

It should not be surprising that it requires a court of three judges pursuant to 28 U.S.C. §2281, to order state officials to release thousands of sentenced prisoners in direct violation of statutes of statewide application that mandate a system of incarceration. The en banc decision of the Fifth Circuit in this case is correct not because eleven circuit judges reached the same conclusion, but because the decision is squarely consistent with opinions of this Court, taking

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25 (E.S.) Ibid, p. 12 (Petitioners' Appendix, p. 33A).

26 Petitioners suggest that the Defendant has statutory discretion to release prisoners by "liberalizing" Florida Statute 944.29, which allows the award of extra good time allowances to deserving inmates. Petition for Writ of Certiorary, p. 22, n. 18. But to "liberalize"the statute would require violation of the statute. Section 944.29 provides:

> Extra good time allowances.- The division may allow, in addition to time credits, an extra good time allowance for meritorious conduct or exceptional industry. (E.S.)

Mr. Wainwright can only grant extra good time allowances if the inmate is deserving, that is, if there has been "meritorious conduct or expectional industry." Godd time can only be awarded in accordance with the express terms of the authorizing statute. Cf. Alexander v. Wilson, 540 P.2d 331, 334 (Colo. 1975). The trial court's reference to similar statutory remedies are similarly useless to the Defendant either because the authority therein is vested in another state official or because the authority therein is limited by statute.

into full consideration the narrow construction historically given to 28 U.S.C. §2281.

On numerous occasions this Court has explained the purpose of a three-judge court. The most important feature is that a three-judge court provides the benefit of the collective judgment of three judges in major litigation, thereby safeguarding the delicate and sensitive balance between state and federal authority:

> . . . these sections were enacted to prevent a single federal judge from being able to paralyze totally the operation of an entire regulatory scheme, either state or federal, by issuance of a broad injunctive order. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 154, 9 L.Ed.2d 644, 653, 83 S.Ct. 554 (1963).

> The crux of the business is procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy. Phillips v. United States, 312 U.S. 246, 85 L.Ed. 800, 804-5, 61 S.Ct. 480 (1941).

The Florida statutes involved in this case embody major legislative policies of statewide application. As mentioned above, Florida has 18 major correctional institutions and numerous smaller institutions located throughout the State. On January 17, 1977, there were 18,181 sentenced prisoners in the custody of Defendant Wainwright.

Because it is so obviously true one tends to forget that a state can deprive a person of his liberty and place him in prison only pursuant to the unequivocal mandate of a system of statutes. Defendant Wainwright receives sentenced prisoners and maintains custody until the sentence is served not as a matter of discretion, but because he is absolutely required to do so by legislative policy embodied in Florida statutes.

Mr. Wainwright is obligated by Florida Statutes, Sections 945.09(1) and 944.16, to receive and maintain custody of all persons sentenced to the Florida correctional system.[27] If Defendant Wainwright obeys the preliminary injunction and refuses to accept custody of newly sentenced felons he will violate a Florida criminal statute. Section 839.21, Florida Statutes, provides:

> 839.21 Refusal to receive prisoner.- Any jailer or other officer, who willfully refuses to receive into the jail or into his custody a prisoner lawfully directed to be committed thereto on a criminal charge or conviction, or any lawful process whatever, shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

Section 839.21, Florida Statutes, is strictly enforced by the Governor.[28]

Plaintiffs acknowledged the existence of the mandate of these statutes in their First Amended Complaint filed on December 14, 1972. Paragraph 5 unabashedly stated:

> Defendants, LOUIE L. WAINWRIGHT, L. E. DUGGER, and J. F. TOMPKINS, are the officials charged under the laws of the State of Florida with the custody, maintenance, and care of the Plaintiffs. (E.S.)

Plaintiffs have since studiously avoided any further citation to these state laws, but the remedy demanded - closing the prisons to additional prisoners or release prisoners - can only be accomplished if the statutes that mandate otherwise are enjoined. In a matter as serious as release of sentenced

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[27] These statutes are reproduced in the Petition for Writ of Certiorari.

[28] The trial court wrote: "However, now that the evidence is clear that the Governor of the State of Florida has issued strict orders to the defendant Wainwright that he not refuse to accept further inmates, this Court cannot decline to act." Costello v. Wainwright, 397 F.Supp. 20, 34 (M.D. Fla. 1975).

prisoners, the test is the concrete effect of the trial court's order, not the pleader's artful choice of words.[29]

The test applied by this Court to determine whether a statute has indeed been enjoined in its operation is pragmatic and results-oriented, and does not turn upon whether the Plaintiffs (or the trial court) have specifically mentioned the statute. This Court has thus been primarily concerned whether there is an "interdiction of the operation at large of the statute," Kennedy v. Mendoza-Martinez, 372 U.S. 144, 155, 9 L.Ed.2d 644, 653, 83 S.Ct. 554 (1971), whether there has been "interference by interlocutory injunction with the enforcement of State legislation," Stratton v. St. Louis Southwestern R.Co., 282 U.S. 12, 14, 75 L.Ed. 135, 137 (1930), whether "by the action of one judge the machinery of state laws can be arrested," Florida Lime and Avocado Growers v. Jacobsen, 362 U.S. 73, 4 L.Ed.2d 568, 572, fn. 5, 80 S.Ct. 568 (1960), or whether there has been "an improvident statewide doom by a federal court of a state's legislative policy," Phillips v. United States, 312 U.S. 246, 251, 85 L.Ed. 800, 803, 61 S.Ct. 480 (1941).[30]

The reason for the preliminary injunction, as stated by the trial court, was that incarceration in Florida's correctional institutions (obedience to statutes mandating incarceration) subjected Plaintiffs to cruel and unusual

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[29] "It is one thing to permit the party for whose benefit an appeal is provided to lose the privilege by artless pleading; it is quite another to permit one party, by artful pleading, to avoid a procedural requirement desined for the protection of the other. The three-judge requirement was enacted to protect the States, not plaintiffs; if in substance the case is within the requirement, the statute should not be frustrated by a form of words." (E.S.) Currie, The Three-Judge District Court in Constitutional Litigation, 32 U.Chi. L.Rev. 1, 39 (1964). See also Swift & Co. v. Wickham, 382 U.S. 111, 122, n.18, 15 L.Ed.2d 194, 202 n.18, 86 S.Ct. 258 (1965) (Invocation of the Supremacy Clause by Plaintiff is irrelevant.)

[30] See also Newman v. Alabama, 503 F.2d 1320, 1326-27 (5th Cir. 1974): Whether "the relief sought, if granted, would inexorably condemn those promulgated rules and regulations not specifically challenged . . . ."

punishment in violation of their constitutional rights. Of course the statutes discussed above are presumably constitutional on their face, but not as applied. As applied, (said the trial court in effect) those statutes inflict cruel and unusual punishment upon Plaintiffs. The preliminary injunction, then, derived its justification only upon the ground that the state officers in this case should be enjoined from the further execution of major statutes because the statutes were unconstitutional in application.[31]

This Court has frequently stated that a three-judge court is required to enjoin a statute because unconstitutional as applied, even though the statute may be constitutional on its face. E.g., Steffel v. Thompson, 415 U.S. 452 n.7, 39 L.Ed.2d 505, 513 n.7, 94 S.Ct. 1209 (1974); Ex Parte Bransford, 310 U.S. 354, 361, 84 L.Ed. 1249, 1253, 60 S.Ct. 947 (1940); Department of Employment v. United States, 385 U.S. 355, 17 L.Ed.2d 414, 87 S.Ct. 464 (1966); Paul v. United States, 371 U.S. 245, 9 L.Ed.2d 292, 83 S.Ct. 426 (1963); United States v. Georgia Pub. Serv. Comm., 371 U.S. 285, 9 L.Ed.2d 317, 83 S.Ct. 397 (1963); Query v. United States, 316 U.S. 486, 86 L.Ed. 1616, 62 S.Ct. 1122 (1942). See also Boddie v. Connecticut, 286 F.Supp. 968, 971, rev'd on other grounds, 28 L.Ed.2d 113, mandate conformed 329 F.Supp. 844:

> Where an injunction is sought against enforcement of a state statute in a manner unquestionably expressive of the legislative intent, a three-judge

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[31] See Board of Managers of Ark. Tr. Sch. for Boys v. George, 377 F.2d 228, 231 (8th Cir. 1967):

> It would clearly be a "contradiction of reason" to attempt to enjoin the state from enforcement of a statute and at the same time not pass upon the constitutionality of the statute. Cf. United States ex rel. McNeill v. Tarumianz, 3 Cir., 242 F.2d 191. (E.S.)

> court is required, even if the statute might be perfectly constitutional in some of its intended application. (E.S.)

Petitioners in the case at bar constitute a class of "all those persons who are now or hereafter will be committed to the custody of the Defendant, Louie L. Wainwright."[32] Thus, the class of persons to whom the statutes are being applied is so broad that in practical effect the preliminary injunction leaves no room for any constitutional application of the statutes.

C.

Phillips v. United States, Ex Parte Bransford, and Butler v. Dexter have no application to the issue in the case at bar.

The Fifth Circuit's decision in this case is entirely consistent with this Court's decisions in Phillips v. United States, 312 U.S. 246, 85 L.Ed. 800, 61 S.Ct. 480 (1941), Ex Parte Bransford, 310 U.S. 354, 84 L.Ed. 1249, 60 S.Ct. 947 (1940), and Butler v. Dexter, 425 U.S. 62, 47 L.Ed.2d 774, 96 S.Ct. ____(1976). In each of those cases the administrative action to be enjoined was either ultra vires a statute, merely permitted but not required by a statute, or unauthorized by any statute and therefore plainly illegal. Unlike the case at bar, in none of those cases was the administrative officer enjoined from strict obedience to the unequivocal mandate of a statute.

There is a sharp and natural distinction between an injunction which restrains " . . . the action of any officer of such State in the enforcement or execution of such statute . . ." (28 U.S.C. §2281) and an injunction which restrains the action of an officer that is arguably authorized but not mandated by the statute, or lawless and ultra vires all

[32] Unpublished Order of the Trial Court, February 20, 1973.

statutory authority. Phillips v. United States, supra, is a classic example of the latter category. In Phillips, the United States sought to enjoin the Governor of Oklahoma from declaring martial law and blocking construction of a federal dam. The Governor justified his actions as authorized by the Oklahoma constitution and statutes. It is significant that those state laws did not require the Governor's actions; and indeed from Mr. Justice Frankfurter's frequent use of the word "lawless" it would appear that the Governor's declaration of martial law not only was not mandated by Oklahoma law but also may have been completely ultra vires all statutory authority. Mr. Justice Frankfurter implied as much as he explained why three judges were not required in Phillips:

> But an attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority even though a misreading of the statute is invoked as justification. At least not within the congressional scheme of §266. It is significant that the United States in its complaint did not charge the enabling acts of Oklahoma with unconstitutionality, but assailed merely the Governor's action as exceeding the bounds of law. 312 U.S. at 252, 85 L.Ed. at 805 (E.S.)

The Governor's action in Phillips was solely his own discretionary administrative action and not the "enforcement or execution" of a mandated legislative policy.[33]

[33] "In Phillips, on the other hand, it was the Governor, not the legislature, who had decided to block construction of the dam. If the legislature had directed him to call out the militia whenever someone attempted to build a dam in Oklahoma, the case would have been differently decided." (E.S.) Currie, The Three-Judge District Court in Constitutional Litigation, 32 U.Chi. L.Rev. 1, 44 (1964). Query v. United States, 316 U.S. 486, 86 L.Ed. 1616, 62 S.Ct. 1122 (1942) had the same explanation for the Phillips rule:

> And this is not, like Phillips v. United States, 312 U.S. 246, 85 L.Ed. 800, 61 S.Ct. 480, a case in which the state officials threatened to engage in conduct which state law could not reasonably be construed to authorize. 86 L.Ed. at 1620.

Phillips therefore has no application to the case at bar. Defendant Wainwright receives and maintains custody of prisoners on a daily basis, not as a single, unique exercise of authority, but because he is required to do so by the legislature in accordance with a clear statutory mandate. His actions are neither a misinterpretation of statutory authority or ultra vires the statute.

Petitioners cite Ex Parte Bransford as making the elusive distinction between suits challenging statutes because unconstitutional "as applied" (requiring a three-judge court) and suits complaining of an "unconstitutional result" obtained by use of a statute. If Bransford is read very carefully, however, one realizes that the "unconstitutional result" distinction is only restatement of the Phillips rule that three judges are not needed to challenge erroneous administrative action which is not required by the statute. Bransford therefore is not, on its facts, applicable to the case at bar.

Bransford was a four-pronged attack upon the collection of county taxes upon bank stock in Arizona. The first three challenges are not relevant here.[34]

The fourth challenge in Bransford was that the assessments were excessive and therefore "confiscatory" and "discriminatory." But unlike the case at bar, the assessment in Bransford that was to be enjoined was not mandated by a statute:

> Such [excessive] assessment, is made and if invalid, are so because of a

[34] The first challenge was that the assessments were void because "unauthorized by the statutes of Arizona." 84 L.Ed. at 1251. This was clearly a challenge within the teachings of Phillips that a suit to enjoin administrative action that is erroneous, or ultra vires the statute, can be heard by a single judge. The second and third challenges were based upon the Supremacy clause: that the assessments were in direct conflict with two federal statutes. A three-judge court is not required if the only constitutional question arises under the Supremacy Clause. 84 L.Ed. at 1252. Swift & Company v. Wickham, 382 U.S. 111, 15 L.Ed.2d 194, 86 S.Ct. 258 (1965).

> wrong done by officers under the statute rather than because of the requirement of the statute itself. (E.S., f.n. omitted.) 84 L.Ed. at 1252.

Thus, if one reads the entire passage in Bransford in which the distinction is made between "statutes unconstitutional as applied" and "unconstitutional results," one recognizes that the "unconstitutional results" distinction is actually a restatement of the Phillips rule that a three-judge court is not required to enjoin administrative action that is "lawless" or "erroneous administrative action":

> The contention of the Bank, however, is that the assessor misinterpreted the statute; that the objectionable aspect of the assessment is the attribution to the common of the whole amount instead of an apportionment to both preferred and common or the use of the preferred as capital stock in the state valuation formula. We are not now called upon to reach any conclusion upon the meaning of the Arizona tax statutes. If the trial court determines that the assessment complained of is made properly under the statute and that by the statute the assessment is to be prorated among the common shares, it would determine only a question of statutory construction. It is necessary to distinguish between a petition for injunction on the ground of the unconstitutionality of a statute as applied, which requires a three-judge court, and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional. The latter petition does not require a three-judge court. In such a case the attack is aimed at an allegedly erroneous administrative action . . . . (E.S., f.ns. omitted.) 84 L.Ed. at 1253.

Butler v. Dexter, decided last term, is entirely consistent with Phillips. In Butler, this Court relief upon the trial court's finding that the state defendants were not attempting to enforce a state criminal statute, but rather were improperly using the statute as a part of a pattern of police harrassment to stop the exhibition of a motion picture in

San Antonio. The trial court had ruled that "[b]y no stretch of the imagination could this statute be used to cover the plaintiff's actions or the possession of an ordinary portable 16 millimeter motion picture projector with removable interchangeable reels." 47 L.Ed.2d at 774. The court then cited Phillips for the point that the action of state officials sought to be enjoined was a lawless exercise of authority:

> Cf. Phillips v. United States, 312 US 246, 252, 85 L.Ed. 800, 61 S.Ct. 480 (1941): "But an attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority . . . . It is significant that the United States in its complaint did not charge the enabling acts of Oklahoma with unconstitutionality, but assailed merely the Governor's action as exceeding the bounds of law." This situation is, of course, to be distinguished from an attack on a statute said to be unconstitutional "as applied." See also Ex Parte Bransford, 310 US 354, 84 L.Ed. 1249, 60 S.Ct. 947 (1940). (E.S., footnote 10.)

Butler v. Dexter is therefore inapplicable to the case at bar. The mandatory requirements of the statutes in this case clearly apply to Defendant Wainwright.

The Eighth Circuit cases cited by Petitioners are not contrary to the Fifth Circuit's decision in this case. Faubus v. United States, 254 F.2d 797 (8th Cir. 1958) is almost identical to Phillips, supra. The injunction in the Faubus case was not to enjoin the enforcement of any statute, but to enjoin the lawless, ultra vires, actions of Governor Faubus:

> The appellees' contention is, in effect, that he could not use State troops, ostensibly to preserve order, in violation of law. (E.S.) 254 F.2d at 805.

Similarly, Aaron v. Cooper, 261 F.2d 97 (8th Cir. 1958) is not like the case at bar. The injunction in that case involved only a single local school district. The defendants were

members of the local school board and the local superintendent. The injunction was purely local in character, and therefore did not require three judges. Board of Regents v. New Left Ed. Project, 404 U.S. 541, 30 L.Ed.2d 697, 92 S.Ct. 652 (1972); Moody v. Flowers, 387 U.S. 97, 18 L.Ed.2d 643, 87 S.Ct. 1544 (1967). Moreover, the actions enjoined in that case were purely voluntary actions, not mandated by statute:

> The only direct observation which we have made in relation to these statutes was to note that what appellees had done did not even represent acts purporting to be required of appellees by the statutes but constituted legally voluntary action on their part. (E.S.) 261 F.2d at 106.

School Board of City of Newport News, Va. v. Atkins, 246 F.2d 325 (4th Cir. 1957), cert. den., 355 U.S. 855 (1957) is equally inapplicable to the case at bar. Like Aaron v. Cooper, the injunction in that case operated only locally (forbidding racial discrimination in the public schools of Norfolk and Newport News, Virginia.) Moreover, the defendants in that case had only asserted that the statute - a Pupil Placement Act - provided an adequate state administrative remedy. The defendants were apparently not required to obey the statute, and no injunction was granted against the enforcement of the Act.

D.

> Petitioners' suggestion that 28 U.S.C. §2281, does not apply to conflicts "between the federal remedial power and state statutes" is directly contrary to the purpose of 28 U.S.C. §2281 and has never been so construed by any court.

Unable to find a decision of this Court inconsistent with the Fifth Circuit's en banc decision, Petitioners proffer a novel and unreasonable way to construe 28 U.S.C. §2281. Petitioners suggest that the injunction to release sentenced

prisoners is merely a "remdial order" of the trial court, and contend that " . . . the state law was overriden because of the district court's remedial power to enforce the Constitution." (P. 28, Petition for Writ of Certiorari.) Petitioners imply that the three-judge court statute should not be applicable because the statute was involved "only at the level of relief." (P. 22, Petition for Writ of Certiorari.)

Petitioners' suggestion has an obvious flaw: collision with the federal injunctive power and the state statute always comes in the relief stage. The remedy is what the three-judge court statute is all about. 28 U.S.C. §2281 is drafted in terms of the remedy to be granted. Were it not for the remedy - an injunction which "interposes the Constitution against enforcement of a state policy"[35] - three judges would not be required.[36] It matters not that the injunction against the operation of the statute is only temporary since 28 U.S.C. §2281 applies as well to preliminary injunctions.[37]

Petitioners' comparison of the "supremacy"[38] of the trial court's remedial power to this Court's treatment of

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[35] Phillips v. United States, 312 U.S. 245, 251, 85 L.Ed. 800, 805, 61 S.Ct. 480 (1941).

[36] See, e.g., Steffel v. Thompson, 415 U.S. 452, 457 n. 7., 39 L.Ed. 505, 513 n.7, 94 S.Ct. 1209 (1974); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 155, 9 L.Ed.2d 644, 653, 83 S.Ct. 554 (1963); Buchanan v. Evans, ___U.S.____, 46 L.Ed. 2d 293, 294 n.1, ____S.Ct.____ (1975) (Dissenting opinion); Flemming v. Nestor, 363 U.S. 603, 607, 4 L.Ed.2d 1435, 1442, 80 S.Ct. 1367 (1960).

[37] Withrow v. Larkin , 421 U.S. 35, 45 n.12, 43 L.Ed.2d 712, 722 n.12, 95 S.Ct. 1456 (1975).

[38] No one would dispute the supremacy of a proper exercise of the federal equity power to protect constitutional rights, but that power surely is not unlimited. See, e.g., Rizzo v. Goode, 423 U.S. 362, 46 L.Ed.2d 561, 96 S.Ct. ____ (1976); O'Shea v. Littleton, 414 U.S. 488, 38 L.Ed.2d 674, 94 S.Ct. 669 (1974). See also Edelman v. Jordan, 415 U.S. 651, 39 L.Ed.2d 662, 94 S.Ct. 1347 (1974).

Supremacy Clause cases in Swift & Co. v. Wickham, 382 U.S. 111, 15 L.Ed.2d 194, 86 S.Ct. 258 (1965), is inapt. The only thing similar is the word "supremacy."

In Swift this Court construed 28 U.S.C. §2281 to be not applicable to challenges to state statutes based solely upon the Supremacy Clause. The Court acknowledged that 28 U.S.C. §2281 could rationally have been construed either way, but decided that a more restrictive interpretation would be consistent with the statute's historic origins. Of importance to the case at bar, however, the Court in Swift commented that the three-judge court statute was largely aimed at ". . . injunctions against the enforcement of progressive state regulatory legislation, usually on substantive due process grounds."[39] In such cases there were " . . . the worrisome possibilities that economic or political predilections will find their way into a judgment."[40] The combined judgment of three judges was to be the safeguard.

The issues in the case at bar are infinitely more complex than Supremacy Clause cases, which involve only an analysis of statutory conflict between a state and a federal statute. To date no federal court has given a very precise answer to the issues raised in the case at bar: what is the minimum constitutional correlation between inmate housing, security staffing patterns, medical care, and cruel and unusual punishment? Is it a matter merely of square feet per inmate? At what point is there a system-wide "deliberate indifference to serious medical needs"? Estelle v. Gamble, 45 U.S.L.W. 4023, Nov. 30, 1976. These issues are difficult, involve major "economic and political predilections," and touch upon sensitive questions respecting state and federal

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[39] Swift & Co. v. Wickham, 382 U.S. 111, 127, 15 L.Ed. 2d 194, 205, 86 S.Ct. 258 (1965).

[40] Ibid.

relations. Such issues are indeed the historic subject matter of three-judge courts.

Petitioners cite five school desegregation decisions (P.29, Petition for Writ of Certiorari), and urge the Court to accept these as authority that "remedial orders" do not need three judges. But all of the cases cited involved local matters (injunctions against local officials) and for that reason alone did not require three judges.[41] Moody v. Flowers, 387 U.S. 97, 18 L.Ed.2d 643, 87 S.Ct. 1544 (1967).

The cases are distinguishable on other grounds, also. For example, in Bradley v. School Board of City of Richmond, Virginia, 324 F.Supp. 396 (E.D. Va. 1971) plaintiffs sought an order to consolidate the school system in the City of Richmond, Virginia, and two surrounding counties. The trial judge concluded that the defendants had full statutory authority to comply with the injunction requested, and therefore would not be required to violate any statute:

> The plaintiffs merely request that one or another authorized optional framework for school management be adopted. (E.S.) 324 F.Supp. at 400.

Bradley is therefore an orthodox application of the three-judge court statute.

The concept of "freezing" set forth in United States v. Duke, 332 F.2d 759 (5th Cir. 1964) is not a novel way to circumvent the three-judge court statute, but indeed is entirely consistent with the three-judge court opinions of this Court. First, the injunction in the Duke case was local, not statewide, so 28 U.S.C. §2281 obviously did not apply. But more important, the injunction did no more than order the

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[41] That is not to say that school desegregation cases, as a category of cases, always were heard by a single judge. The federal school desegregation cases consolidated in Brown v. Board of Education of Topeka, Kansas, 347 U.S. 483, 98 L.Ed. 873, 74 S.Ct. 686 (1954) were all tried before three-judge courts.

voter registrar to either continue to apply the registration statutes loosely (but equally to black as well as white citizens) or to apply the statutes strictly and reregister all citizens. Had the registrar chosen to apply the statutes strictly he would have been in full compliance with those statutes, and no statute would have been nullified by the injunction. Conversely, had the registrar chosen to continue his loose interpretation of the statutes, it would not involve an injunction against the operation of the statutes to order him simply to continue that loose interpretation equally for blacks as well as whites.

Haney v. County Board of Education of Sevier County, 429 F.2d 364 (5th Cir. 1970) similarly was not a three-judge case. Again, the case involved only a single county school board. Moreover, it is not at all clear that the injunction in Haney required defendants to violate a statute, although perhaps compliance with the statute was, in and of itself, not enough to satisfy the constitutional claims. Haney says that "the remedial power of the federal courts under the Fourteenth Amendment is not limited by state law," a statement which of course is true. But Haney then cites Louisiana v. United States, 380 U.S. 145, 154 (1965) as authority for that statement. Louisiana v. United States was a three-judge court case.

In Gautreaux v. Chicago Housing Authority, 342 F.Supp. 827 (N.D. Ill., 1972) a three-judge court was not needed because the effects of the order were only local, limited to the actions of the Chicago Housing Authority.

The injunction in United States v. Greenwood Municipal Sep. School Dist., 406 F.2d 1086 (5th Cir. 1969) required the local school board to insure an integrated school faculty. But since the school board had statutory authority to refuse

to approve teacher contracts, and could therefore comply with the order without violating a statute, a three-judge court was not necessary.

United States v. Board of Educ. of City of Bessemer, 396 F.2d 44 (5th Cir. 1968) is likewise distinguishable as a case not involving an injunction having statewide impact, and silent on the three-judge court issue. Moreover, the passing reference to teacher hiring or security statutes neither says that such statutes had to be violated nor discusses the need for a three-judge court. Of course, as the Bessemer court opines in dicta, 396 F.2d at 51, federal constitutional rights may not be overriden by state statutes, but that is not the same thing as saying that state statutes may procedurally be overriden by a single judge.

As their final reason for adopting an incorrect construction of 28 U.S.C. §2281, Petitioners note that requiring a three-judge court now will cause delay in litigation. Delay, of course, is not a desirable result, but Petitioners must share a large part of the responsibility for the delay. Petitioners chose to launch this massive attack upon Florida's correctional system, commingling many difficult issues. Petitioners also chose not to specify in detail the relief they were seeking. Petitioners would have suits of this nature be a pleaders' paradise, a matter of keeping Plaintiffs' options open indefinitely so that the trial court may "experiment with remedies." (P. 30, Petition for Writ of Certiorari.) As recently as last month, Petitioners sought to join as Defendants in the trial court Florida's Governor and Cabinet. The apparent reason for seeking joinder of those officials is that the Governor and Cabinet have some authority to reallocate appropriations and sell state lands. If delay

is caused because a three-judge court is needed to set aside state statutes governing appropriations and state lands, that delay is certainly not caused by Defendants.[42]

In summary, the decision herein by the en banc Fifth Circuit is in strict accord with the decisions of this Court. It would be quite inappropriate to confuse three-judge court law by adopting the strained and plainly wrong construction of 28 U.S.C. §2281 offered by Petitioners.

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42 The three-judge court statute was intended not only to expedite litigation but also to safeguard major state programs from improvident doom. Phillips v. United States, supra.

III.

THE COSTELLO CASE WAS COMMENCED LONG BEFORE THE PROSPECTIVE REPEAL OF THE THREE-JUDGE COURT STATUTE; THE REPEAL DOES NOT APPLY TO "ANY ACTION COMMENCED ON OR BEFORE THE DATE OF ENACTMENT."

Section 7 of Public Law 94-381, expressly provides that: "This Act shall not apply to any action commenced on or before the date of enactment." The word "commenced" is a technical word that has special meaning with respect to civil lawsuits in federal courts, and it must be assumed that Congress intended to use the word in its technical sense.[43] Rule 3 of the Federal Rules of Civil Procedure provides:

> A civil action is commenced by filing a complaint with the Court. (E.S.)

Congress intended to limit the repeal of 28 U.S.C. §2281 to cases which are commenced by filing a complaint after August 12, 1976. That "commenced" was to be understood as synonymous with "filing" is apparent from the section-by-section legislative analysis which provides:[44]

> Section 7.- This section provides that the act shall not apply to any action commenced on or before the date of enactment. It is merely added to make clear that cases filed prior to the enactment of this bill shall proceed to final disposition under the law existing on the date they were commenced. (E.S.)

The intent of Congress is clearly stated. Any other construction of the repealer would be an extraordinary distortion of plain words.

Bradley v. Richmond School Board, 416 U.S. 696, 40 L.Ed. 2d 476, 94 S.Ct. 2006 (1974) is authority contrary to Petitioners'

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43 Morissette v. United States, 342 U.S. 246, 263, 96 L.Ed.2d 288, 300, 72 S.Ct. 240 (1952). See generally 73 Am.Jur.2d §239, Statutes.

44 S. Rep. No. 94-204, U.S. Code Cong. & Admin. News, 94th Cong. 2nd Session, p. 3173.

position. Bradley states that an appellate court shall not apply a change in the law to a pending case if ". . . there is statutory direction or legislative history to the contrary." 416 U.S. at 711, 40 L.Ed.2d at 488. Bradley further said:

> Where Congress has expressly provided, or the legislative history has indicated, that legislation was to be given only prospective effect, the courts, in the absence of any attendant constitutional problem, generally have followed that lead. (E.S., citations omitted.) 416 U.S. at 715 n.21, 40 L.Ed.2d at 490 n.21.

The construction that Petitioners suggest not only flies in the face of Section 7 of the Act, but also would substitute a much more difficult rule to apply. When would a case be said to be "properly commenced" before a three-judge court? Should the critical point be official convening of the court by the appellate court? That would be unfair to those cases wherein the trial court had requested a three-judge court but none had yet been convened by the appellate court on August 12, 1976. Or should the critical point be the official request by the trial judge? Again, in a case where the trial judge inexplicably delayed making an official request (or, as in the case at bar, erroneously refused to request a three-judge court) it would be unfair to deny a three-judge court.

A three-judge court has been needed in this case at least since February 14, 1972, when Petitioners filed their First Amended Complaint demanding that Defendants "mandatorily . . . redistribute or reduce the prison population . . . ." Defendants must share the responsibility with Petitioners for failing to insure that a three-judge court was convened at that time. But 28 U.S.C. §2281 is jurisdictional and cannot be waived by the parties. See Kennedy v. Mendoza-Martinez, 372 U.S. 144, 9 L.Ed.2d 644, 83 S.Ct. 554 (1963). At least since May 12, 1975, Defendants have vigorously sought the

right to be heard by three-judges. Defendants should not be denied this jurisdictional right simply because the trial court erroneously denied the request for three judges.[45]

[45] The case was immediately appealed. The case was argued before the en banc Fifth Circuit on June 8, 1976, but the opinion was not rendered until September 27, 1976.

SUMMARY

For the foregoing reasons, the Petition for Writ of Certiorai should be denied.

Respectfully submitted,

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